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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED *

1. Whether a member of the press, which was not a party to the underlying action, has standing, representing the public, to challenge a protective order which prevents a governmental entity, as a party to civil litigation involving matters of significant public importance, from revealing to the press or public pretrial discovery documents or discussing information contained in them.

2. Whether a protective order in a case involving expenditures of public funds which is entered and continued on the basis of a conclusory statement that the discovery materials are "confidential," and without any consideration of the First Amendment, satisfies the "good cause" requirement of Fed. R. Civ. P. 26(c).

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* Respondents whose names are not contained in the caption are the Oklahoma Department of Human Services; Comanche County Memorial Hospital; Hillcrest Medical Center; Oklahoma Hospital Founders Association, Inc.; St. Anthony Hospital; and St. John Medical Center, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Oklahoma Publishing Company ("OPUBCO")[1] petitions that a writ of certiorari issue to review the opinion and judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[2] is reported at 748 F.2d 1421 (10th Cir. 1984). The order of the United States District Court for the Western District of Oklahoma is unreported (App. 11a).

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[1] The Oklahoma Publishing Company has the following affiliated or subsidiary companies that are not wholly owned: The Farmer Stockman Publishing Company; Datatek Corporation.

[2] "App." refers to the Appendix to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on January 31, 1985 (App. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fed. R. Civ. P. 26(c) states in pertinent part:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any orders which justice requires to protect a party or person . . . ."

STATEMENT OF THE CASE

By this petition, OPUBCO seeks to protect its right and that of the public to learn of information contained in litigation documents exchanged in a suit settled by a state agency before trial which resulted in the payment of millions of dollars in public funds for Medicaid reimbursement to private entities. OPUBCO, publisher of *The Daily Oklahoman*, an Oklahoma City daily newspaper with the largest paid circulation of any newspaper in the state, has reason to believe that cost reports submitted to the Oklahoma Department of Human Services ("DHS") by four Oklahoma hospitals and used, in part, as a basis for Medicaid reimbursements may have been highly inflated. Only a protective order entered

without the "good cause" required by Fed. R. Civ. P. 26 (c) prevents OPUBCO from verifying this through access to materials produced in civil discovery.

The documents OPUBCO seeks are at the heart of the public controversy initiated by the filing of the underlying action by the Oklahoma Hospital Association and five of its members ("Hospitals"). In 1983, DHS changed the methodology by which it reimburses hospitals for inpatient hospital services provided under the Oklahoma Medical Assistance Program.[3] This change would have reduced reimbursement to the Hospitals by $16 million in comparison to the previous plan. On May 10, 1983, the Hospitals brought an action to enjoin DHS from implementing this new methodology.

Invoking jurisdiction under 28 U.S.C. § 1331, the Hospitals filed suit in the United States District Court for the Northern District of Oklahoma in Tulsa where venue was improper.[4] On May 25, 15 days after the suit was filed, DHS's motion for a change in venue was granted, and the case was transferred to the Western District of Oklahoma and randomly assigned to District Judge Russell. However, with the encouragement of the Hospitals[5] and over DHS's objections, Judge Brett, to whom the case was originally assigned in the Northern District, was reassigned to the case on June 7.

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[3] DHS is authorized to administer the Medical Assistance Program under Okla. Const. art. 25, § 1, and Okla. Stat. tit. 56, § 162.

[4] *See* 28 U.S.C. § 1391(b); *see also* Order (May 25, 1983), at 4, Oklahoma Hospital Association v. Oklahoma Department of Human Services, No. CIV-83-1274-BT (W.D. Okla. filed May 31, 1983) [*OHA v. DHS*] ("Because all the defendants reside in the Western District of Oklahoma and the cause of action arose in the Western District of Oklahoma, the Court concludes venue in this district [Northern] is improper.").

[5] By a letter dated May 27, 1983, the Hospitals advised the Clerk for the Western District that it was "important that the case remain in Judge Brett's Court."

On August 29, DHS moved to disqualify the trial judge under authority of 28 U.S.C. § 445 on the grounds that (1) prior to becoming a judge, Judge Brett had represented St. Francis Hospital, Inc., the largest hospital member of the OHA, in a suit against DHS involving similar issues; (2) Judge Brett had a prior business association with a witness (a St. Francis employee) listed by the Hospitals to appear at the hearing on a preliminary injunction; and (3) Judge Brett would not have been assigned the case had it not been filed in the Northern District where venue was improper.[6]

On September 2, DHS served the Hospitals with a document discovery request under Fed. R. Civ. P. 34 which asked for production of the financial documents which support cost reports submitted by the Hospitals in fiscal years 1980-83. Defendants' First Request for Production of Documents (Sept. 2, 1983), *OHA v. DHS*. The Hospitals offered to produce the requested documents if covered by a protective order. This order would exclude access to all documents for which a privilege was claimed, would prohibit public dissemination of any material produced and provide that all material produced but not introduced in open court would be returned to the originating party or destroyed upon completion of the litigation. The court would rule on privilege disputes after an *in camera* inspection. DHS agreed and sought a similar order for documents it produced. Both protective orders were requested on the sole basis that the documents were "confidential." No "good cause" for request-

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[6] DHS argued that filing in the Northern District was significant because "of the three district judges assigned to the United States District Court for the Northern District of Oklahoma who are regularly assigned cases in that district, . . . two judges . . . represented the hospitals in actions against DHS while they were in private practice, and their former firms still represent these hospitals." Defendant's Motion for Disqualification and Supporting Brief at 5, *OHA v. DHS*.

ing the orders was given by the parties, as required by Fed. R. Civ. P. 26(c).

On September 9, the court signed the protective order offered by the parties concerning the documents produced by the Hospitals.[7] The order did not suggest any additional rationale beyond that provided by the Hospitals. The court noted only that "in order to expedite discovery" the parties were "prepared to agree to production of the documents" and that the "records in question" were of a "confidential nature." Protective Order (Sept. 9, 1983), at 4, *OHA v. DHS.* With few exceptions, the approximately 100,000 discovery documents covered by the Hospitals' order were not reviewed by the court.[8]

On September 22, the district court denied DHS's motion to disqualify. On September 27, DHS sought a certified interlocutory appeal of the trial court's denial of the recusal motion under 28 U.S.C. § 1292(b). This request and a related request to stay the trial were denied on October 5, and the trial was scheduled to begin on October 11. However, trial was delayed after the parties advised the court that serious settlement negotiations had begun.

On November 22, the Hospitals and DHS announced a tentative settlement, under which DHS would reimburse the Hospitals during the next fiscal year at a level approximately $8 million greater than DHS initially pro-

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[7] On September 26, a similar protective order was entered covering the documents to be produced by DHS.

[8] The trial court examined, *in camera,* several documents the Hospitals refused to produce, including the minutes of an Oklahoma Hospital Association Executive Committee meeting held May 2, 1983. The Hospitals' assertion of an attorney-client privilege concerning these documents was upheld. Order (Oct. 4, 1983), *OHA v. DHS.*

posed. The parties proposed that the settlement would be entered into and the case dismissed on December 15, at which time the documents produced during discovery would be destroyed or returned under the terms of the protective order.

OPUBCO's attention was called to the discovery materials when it learned that an investigator who had made a hurried, cursory review of some documents produced by the Hospitals had testified in a deposition that the Hospitals factored into their cost reports such items as "condominiums . . . [and] expensive food items being air freighted in from time to time on a regular basis," "a surfer package for an individual to Waikiki Beach" and "expenditures for what I considered to be unusual foodstuffs . . . ." Deposition of William D. Brown (Sept. 22, 1983), at 58, 59, *OHA v. DHS.* The investigator stated, "I don't understand the connection between country clubs . . . condominiums at resort lakes and running a hospital." *Id.* at 91.[9] When *The Daily Oklahoman* reporters sought additional information, DHS representatives told them that only the September 9 protective order prevented the agency from giving them access to the discovery documents produced by the Hospitals.

Based on the investigator's testimony, OPUBCO asked to appear specially for the limited purpose of urging that the protective orders be vacated.[10] Application of

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[9] OPUBCO did not learn about this testimony earlier because under local rules discovery documents and depositions are not filed with the Clerk "unless on special order of the Court or unless they are attached to a motion, response thereto, or are needed for use in a trial or hearing." W.D. Okla. R. 10(e).

[10] By the time OPUBCO moved to appear specially, it was apparent that the Hospital's discovery documents would not be used in open court and would be destroyed. However, it is clear from the pretrial conference that DHS would have introduced these documents in open court had the case been tried. As DHS counsel stated, "We're going to show which expenses are not necessary

OPUBCO to Appear Specially and Applicant's Motion to Vacate Protective Order (Dec. 12, 1983), *OHA v. DHS*. OPUBCO asserted that the orders were not valid under Fed. R. Civ. P. 26(c) absent a showing of "good cause," and that preventing public access to evidence of possible misallocation of public funds contravened the First Amendment.

DHS neither supported nor opposed OPUBCO's motion. Response to [sic] Defendants Oklahoma Department of Human Services and Robert Fulton to The Oklahoma Publishing Company's Application to Appear Specially and Motion to Vacate Protective Orders (Jan. 5, 1984), *OHA v. DHS*. Indeed, DHS stated that it immediately would make available to OPUBCO all documents it had produced during discovery. Transcript of Hearing on Motion to Vacate Protective Orders (Jan. 11, 1984), at 38-39, *OHA v. DHS* [Hearing Transcript].

On January 27, 1984, the district court, while recognizing OPUBCO's standing to move to vacate the orders, denied OPUBCO's motion. Despite acknowledging that "some of the materials sought may be a matter of public interest as the lawsuit involved the expenditure of large sums of public funds," the court found that the parties had stipulated to the orders and had a right not to reveal information if they so chose. Order (Jan. 27, 1984), *OHA v. DHS* (App. 14a).

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for an economic and efficient hospital. These [are the] documents underlying the Medicare cost reports that DHS officials relied upon in performing Medicaid methodology that's in dispute in this case. Most of these will be presented in summary form." Pretrial Conference Transcript (Sept. 27, 1983), at 8, *OHA v. DHS*. During the same conference, the court paraphrased the DHS position by saying, "We've got approximately 20 areas of expenses that were unnecessary to the Medicaid costs of an efficiently and economically run hospital. And those 20 are broken down into further more expenses areas and the entire 20 may have 50- to 60,000 documents behind them." *Id.* at 31-2.

OPUBCO appealed the district court's decision to the Tenth Circuit, invoking its jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed based solely on its determination that OPUBCO lacked standing to challenge the protective orders. The court relied on the test set forth in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The court acknowledged that since OPUBCO had alleged "that were it not for the protective orders, the parties would be free to disseminate, and it would thereby be free to gather and publish, discovery documents not subject to those orders," OPUBCO met the "injury in fact" prong of the *Valley Forge* test. *Oklahoma Hospital Association v. Oklahoma Publishing Company*, 748 F.2d 1421, 1424 (10th Cir. 1984) (App. 6a).

However, the panel found that OPUBCO did not satisfy the second part of the test, *i.e.*, "whether OPUBCO's alleged injury 'fairly can be traced to the alleged action' and 'is likely to be redressed by a favorable decision.'" *Id.* (quoting *Valley Forge*, 454 U.S. at 472). Despite having alluded to OPUBCO's representation that only the continued existence of the protective order prevented access to the documents, and despite submission to the court of an affidavit from a DHS assistant general counsel stating that DHS would permit OPUBCO to review the documents if the order were vacated, the Tenth Circuit concluded that lifting the protective order would not result in OPUBCO having access to the discovery documents. *Id.* at 1425 (App. 7a). Additionally, the court concluded that the interest which OPUBCO sought to vindicate in seeking to vacate the protective order was not within the zone of interests protected by the First Amendment—concluding that the press had no special right of access to discovery materials. *Id.* (App. at 8a). OPUBCO timely filed a petition for rehearing and suggestion for rehearing *en banc*. The petition and sugges-

tion were denied without opinion on January 31, 1985 (App. 10a). The return of the documents to the Hospitals has been stayed pending action by this Court. Order (Jan. 31, 1984), *OHA v. DHS*.

REASONS FOR GRANTING THE WRIT

The importance of this case rests in the nature of the documents OPUBCO and the public are forbidden to see. These documents contain cost information that may reveal whether certain of the Hospitals' Medicaid cost reports were inflated or whether public officials breached their duties in agreeing to pay public funds to the Hospitals at rates exceeding efficient and "reasonable" costs. 42 U.S.C. § 1396(a)(13)(A).

The protective orders in the underlying litigation prevent the parties from allowing the press or public to view these important documents and forbid the parties from discussing information contained in them. Allegations of fraud in the use of public funds cannot be investigated while the orders are in place, and the public therefore remains uninformed about the legitimacy of the Hospitals' claims and the actions of DHS officials.

DHS determines the rate of Medicaid reimbursement it pays by, in part, relying on cost reports submitted by the Hospitals. The cost reports are summaries of those costs which the Hospitals believe support their claims for reimbursements. The protected discovery documents are those the Hospitals used to prepare the costs reports, *i.e.*, the proof or evidence relied on by the Hospitals to seek public funds. As characterized by a DHS attorney, "These documents are the underlying documents for the Medicare and Medicaid cost reports that were at issue in this case." Hearing Transcript at 34. Without reviewing these documents, the press and the public cannot assess the validity of the Hospitals' claims for Medicaid reimbursement or evaluate whether DHS acted in the public interest when it adopted the new methodology or settled this case.

This case presents two questions of law which warrant review by this Court. First, the court below simply was wrong in holding that OPUBCO did not have standing to challenge the protective order. This Court and other courts of appeals have permitted the news media, representing the public, to challenge protective orders which sealed documents, closed judicial proceedings or ordered certain persons not to discuss information gained during the course of litigation. The Tenth Circuit's decision, then, is in conflict with decisions of this Court and creates a conflict among the circuits. It represents a clear deviation from the principle established by this Court that the press can challenge orders which prevent the public from learning of judicial proceedings. Since OPUBCO's standing was the sole ground for the Tenth Circuit's decision, its holding should be reversed on this basis alone.

Second, the Tenth Circuit apparently read this Court's decision in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984), as permitting courts to prevent public access to pretrial discovery documents under all circumstances. *Rhinehart* does not stand for this, but only for the proposition that if "good cause" first is shown for issuing a protective order under Fed. R. Civ. P. 26(c), no additional right of access can be grounded in the First Amendment. The court of appeals erred in not reaching the question of whether "good cause" was shown for initially entering or later continuing the protective order in question here. Because the trial court did not consider the "good cause" standard, and ignored the First Amendment and public interest implications of the order, the protective order violated Fed. R. Civ. P. 26(c) and should have been vacated.

The decisions below, if allowed to stand, are important in that not only do they forever prevent public examination of what appears to be flagrant misuse of public funds, but in a startling departure from this Court's

holdings, will drastically reduce access by the media, and through them the public, to judicial proceedings. The decisions under review permit courts to entirely ignore on standing grounds any claim by a nonparty that an order closing a proceeding or otherwise restricting access is improper, and further takes a proceeding—civil discovery—which for almost 50 years has been presumptively open to public examination, and allows it closed upon no more than a conclusory request. The effect of these rulings inevitably will lessen the "uninhibited, robust, and wide-open" debate on public issues that is at the heart of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

I. The Tenth Circuit's Holding That OPUBCO Lacked Standing to Challenge the Protective Orders Is in Conflict with Decisions of This Court and Other Courts of Appeals

It was plain error for the Tenth Court to hold that OPUBCO lacked standing to challenge the protective orders at issue. This Court repeatedly has recognized the proper role of the press in asserting a First Amendment objection to restrictions on public information, not based on the interests of the press itself, but on vindication of the public's First Amendment interests.

For example, in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the three national commercial broadcast television networks and other media organizations asked to copy portions of audio tapes played during a criminal trial stemming from the Watergate break-in. This Court did not question the press' standing to seek access to these judicial materials, but ruled only that the Presidential Recordings Act, 44 U.S.C. § 2107, did not permit such copying. Similarly, this Court has accepted the media's standing to object to orders restricting the press' and the public's right of access to judicial proceedings. In *Press-Enterprise Co. v.*

Superior Court, 464 U.S. 501 (1984), a newspaper petitioned for a writ of mandamus to compel the release of a transcript of voire dire proceedings in a criminal trial. This Court ruled, implicitly granting the newspaper's standing, that voir dire examinations are presumptively open. This Court also implicitly recognized the press' standing to challenge the closure of a trial, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and a pretrial hearing. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). In each of these cases, the petitioner newspapers were not parties to the underlying action and often appeared to challenge a trial court's order after it had been granted. Nonetheless, this Court ruled on the merits of the challenges. In the instant case, however, the Tenth Circuit refused to reach the merits and instead found OPUBCO without standing to object to the orders. This is in direct conflict with the stance of this Court.

The Tenth Circuit's decision also is in conflict with other courts of appeals which have permitted challenges to closure or protective orders by media representatives who were not parties to the underlying action. Courts of appeals may have disagreed on the form the case must take on appeal to challenge a lower court's order.[11] However, at least eight circuits—the First, Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth—have held that media representatives who were not parties to an action

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[11] Some courts of appeals have implicitly recognized the right of media representatives to bring such challenges. *See, e.g., In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). Others have held that the media first must intervene in the underlying action. *See, e.g.*, United States v. Criden,, 675 F.2d 550 (3d Cir. 1982). Some require media representatives who are not parties to the underlying action to challenge closure or protective orders only by petitioning for writs of prohibition or mandamus. *See, e.g.*, United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

had standing to argue that certain judicial documents should be made public.[12] OPUBCO's appeal of the district court's refusal to vacate the protective orders was consistent with these cases, in none of which was there an objection to the news media's standing.

The Tenth Circuit chose to overlook this body of precedent making clear that the news media, representing the public, have the right to challenge protective orders. It also ignored the district court's apparent acceptance of OPUBCO's standing.[13] Further, counsel for the Hospitals conceded OPUBCO's standing in the district court.[14]

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[12] *See, e.g., In re* Coordinated Pre-Trial Proceedings, —— F.2d ——, 10 Med. L. Rptr. 2430 (9th Cir.), *cert. denied,* 105 S. Ct. 768 (1984) (newspapers granted writ ordering trial court to lift stay delaying declassification of pre-trial documents); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (newspaper challenged trial court rulings closing pre-trial hearing, sealing transcript and ordering counsel not to reveal "confidential" information); *In re* Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) (newspapers moved to have document used in liitgation made available to public); *In re* Knoxville News-Sentinel, 723 F.2d 470 (6th Cir. 1983) (newspaper motion to vacate order allowing party in underlying action to remove exhibits); *In re* Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1983) (reporters sought writ of mandamus to order district court to release transcript of contempt hearing); *In re* San Juan Star Co., 662 F.2d 108 (newspaper challenged trial court's order forbidding attorneys in civil rights suit from disclosing evidence obtained through depositions); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (reporters sought permission to copy audio tapes used at trial); Application of National Broadcasting Co., Inc., 635 F.2d 945 (2d Cir. 1980) (television network sought access to videotapes used in criminal trial).

[13] The Order denying the relief OPUBCO sought did not question OPUBCO's standing. Order (Jan. 27, 1984), *OHA v. DHS* (App. 11a).

[14] *See, e.g.,* Hearing Transcript at 10, *OHA v. DHS* ("We don't contest their [OPUBCO's] standing to be in this courtroom today. We think there are sufficient cases that that question is moot.").

Instead, the court below applied the test for standing found in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464. There, this Court noted that it is not sufficient for a party to request "a court of the United States to declare [the party's] legal rights." *Id.* at 471. Rather, the litigant must "have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.* Standing requires "at an irreducible minimum" that the party " 'show that he personally has suffered some actual or threatened injury' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' . . . ." *Id.* at 472 (citations omitted). The Tenth Circuit erred in finding that OPUBCO did not meet the test, assuming *arguendo* that it is applicable here.

The court of appeals conceded that OPUBCO complied with the "injury in fact" prong of the test, but ruled that OPUBCO's injury could not be redressed by a favorable decision and thus that the second part of the test was not met.[15] To the contrary, the record indicates that in the absence of the protective orders DHS would allow OPUBCO access to the pertinent documents.

In its brief to the Tenth Circuit, OPUBCO emphasized that "representatives of DHS told reporters for *The Daily Oklahoman* that only the protective orders prevent the agency from revealing the documents produced by the Hospitals to the journalists." Brief of Appellant at

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[15] The Tenth Circuit did not have this Court's guidance in applying that portion of the *Valley Forge* test on which the court of appeals focused, *i.e.*, whether OPUBCO's injury is likely to be redressed by a favorable decision. Since this Court found that the plaintiffs in *Valley Forge* failed to identify any personal injury, the Court did not need to apply the second prong of the test to the facts before it. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 477.

4. The Hospitals did not dispute that this was DHS's intention.[16]

Contrary to the Court of Appeals' findings, OPUBCO did not ask for adjudication of "abstract questions" or "generalized grievances." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). It showed a " 'distinct and palpable injury' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501). The record offers no basis to doubt that vacating the protective orders would permit OPUBCO to review the documents in question and allow the parties in the district court to discuss the documents with OPUBCO. Thus, both prongs of the *Valley Forge* test are met, confirming OPUBCO's standing to challenge the orders.[17]

The court of appeals' decision on standing, therefore, is entirely at odds with decisions of this Court and every court of appeals which has considered the question. If allowed to stand, the ability of the press to vindicate the First Amendment rights of the public in access to judicial proceedings, which often, like this case, involve issues of overwhelming public importance, will be virtually defeated.

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[16] To remove any doubt concerning DHS's intention to release the discovery documents if the protective orders were vacated, OPUBCO submitted with its Petition for Rehearing an affidavit from the Assistant General Counsel to the Department of Human Services for the State of Oklahoma who is the custodian of the discovery documents. This affidavit stated that, if the bar of the protective orders were lifted, DHS would permit OPUBCO access to the documents. App. 22a.

[17] Other aspects of the court of appeals' decision, in particular its improper interpretation of *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984), are addressed in Argument II, *infra*.

II. The Decisions Below, in Refusing to Vacate a Protective Order Despite the Absence of a "Good Cause" Showing, Conflict with Decisions of This Court and Other Courts of Appeals and Violate the Federal Rules of Civil Procedure

The Tenth Circuit's decision—erroneously finding that OPUBCO lacked standing to challenge a protective order and disregarding the trial court's abuse of its discretion in issuing and maintaining a protective order without "good cause shown"—is in direct conflict with decisions of this Court and other courts of appeals and in violation of the Federal Rules of Civil Procedure. If allowed to stand, the decision will permit district courts in the six states of the Tenth Circuit, and others which adopt the precedent, to enter Rule 26(c) protective orders without satisfying the rule itself. A party's mere assertion of "confidentiality"—and the district court here based its order on nothing more—will be sufficient to seal all discovery documents and prohibit parties from discussing them. Even in cases of significant public interest, as is the instant case, the public will remain uninformed of all information elicited during discovery except for that used in open court.

The Federal Rules do not condone this, and, as shown by *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, neither does this Court. The plain meaning of the Federal Rules of Civil Procedure is that the discovery process is presumptively open. The norm under Rule 26 is that disclosure is permitted; the exception, requiring judicial action, is a protective order. Accordingly, the Seventh Circuit concluded that, "As a general proposition, pretrial discovery must take place in the public unless *compelling reasons* exist for denying the public access to the proceedings." *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979) (emphasis added). Further, subdivision (d) was added to Rule 5 in 1980 specifically to protect the rights of nonparties to have access to "deposi-

tions . . . . interrogatories, requests for documents, requests for admission, and answers and responses thereto . . . ." Fed. R. Civ. P. 5(d).[18] Initially, the Advisory Committee suggested that, due to storage costs, discovery materials not be filed unless so ordered by the court or for use in open proceedings. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 622-23 (1978). Despite its recommendation that discovery materials normally not be filed, the Committee appended a note making clear that nonparties still were to have access to the materials:

> "This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provision of Rule 26(c)." *Id.*

However, following complaints by the press and others "about the 'unconscionable burden' of obliging them to secure a court order for access," the Advisory Committee instead recommended the current Rule 5(d). Amendments to Rules, 85 F.R.D. 521, 540 (1980). The subsection now presumes that material served on parties will be filed and open to the public. The Advisory Committee note to the 1980 amendment recognizes that sometimes

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[18] Fed. R. Civ. P. 5(d) states:

> "All paper after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and response thereto not be filed unless on order of the court or for use in the proceeding."

no use is made of discovery materials, "[b]ut such materials are sometimes of interest to those who may have no access to them . . . such as members of a class, litigants similarly situated, or *the public generally.*" Fed. R. Civ. P. 5(d) advisory committee note (1980) (emphasis added). Even the rejected Rule 5(d) recognized a right of access for nonparties to discovery materials.

Similarly, Rule 30(f)(1) requires that depositions be "promptly file[d] . . . with the court in which the action is pending" unless otherwise ordered by the court. This filing requirement was added to Rule 30 in 1980, and the advisory committee note refers to the note to Rule 5(d) as an explanation of the amended provision. Together, the Federal Rules of Civil Procedure and the advisory committee notes show that discovery proceedings are presumptively open, for the purpose of allowing access by nonparties such as OPUBCO here.

The district court, however, took the opposite approach. Neither the Hospital nor DHS showed good cause with particularity, as this Court has required under Rule 26(c):

> "To establish 'good cause' for a protective order under [Fed. R. Civ. P.] 26(c), [t]he courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements . . . .'" *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (quoting *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979)).

Despite this, the district court issued the requested orders, although the sole reason even suggested by the parties' motions was the general and conclusory statement that the documents at issue were "confidential." Plaintiffs' Combined Response to Defendants' First Request for Protective Order; and Plaintiffs' Brief in Support of the Foregoing at 6, *OHA v. DHS*.

Other than this bald assertion of confidentiality, the court had no information before it that explained why

protection from public access was necessary.[19] Even given two additional opportunities to specify the reasons for needing a protective order, the Hospitals failed to do so. In their brief opposing OPUBCO's motion to vacate the orders, the Hospitals referred only to "the confidential status of the documents and records exchanged." Hospital Brief at 2, *OHA v. DHS*. In the argument before the district court on OPUBCO's motion, the Hospitals again merely asserted confidentiality while also suggesting that some documents might be privileged. Hearing Transcript at 15.[20]

The district court's general conclusion that the materials were confidential by itself is insufficient to support a protective order. *See, e.g., Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich 1981). Further, although the Hospitals never explained the nature of their claim of confidentiality, there is no reason to believe that the materials involved would support the entry of a broad protective order.

First, courts have held that corporate entities, such as the individual hospitals, have no generalized privacy ex-

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[19] Additionally, at oral argument before the district court, the Hospitals indicated for the first time that an underlying reason for the orders was to expedite beginning the trial. Hearing Transcript at 20. Whatever validity that suggestion might have had when the order was entered, it had none by the time the district court considered OPUBCO's motion to vacate, since the underlying case had by then been settled.

[20] Apparently responding to this claim, in denying OPUBCO's motion to vacate the protective orders, the trial court suggested that the orders may have been entered in part because some "documents were subject to various privileges." Order (Jan. 27, 1984), at 2, *OHA v. DHS* (App. 12a). However, the Hospitals did screen the material before making copies for DHS, removing numerous documents in the process. Hearing Transcript at 15. Further, the protective order set forth a procedure for allowing the district court to rule on disputed claims of privilege. As noted, *see supra* note 8, the parties used this procedure at least once. It must be presumed, therefore, that none of the documents actually produced were subject to a claim of privilege.

pectations. To the degree the district court read the Hospitals' claim of "confidentiality" as an interest in keeping their business practices from public view, the decisions are in conflict with other courts. For example, the Sixth Circuit has stressed that "showing that the information [in discovery documents for which a protective order was requested] would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984). A district court hearing a complex antitrust case refused to issue a protective order to cover material which alleged that companies had engaged in price fixing and which discussed the companies' analysis of how government regulations would affect the prices and supply of their products, concluding that this material, although doubtless confidential, was not subject to the expectations of privacy which has to be established for "good cause" to be shown. *In re Coordinated Pre-Trial Proceedings*, 101 F.R.D. 34 (C.D. Cal. 1984).

Additionally, in the Medicare program, hospitals and nursing homes providing services similar to those provided by the Hospitals to the Oklahoma Medicaid program are required to file cost reports with insurance companies which act as intermediaries for the Department of Health and Human Services. 42 U.S.C. § 1395g; 42 C.F.R. § 405.453. Medicare regulations require that cost reports be made available to the public on written request. 20 C.F.R. § 422.435. Since these reports contain "detailed financial information," providers have contended "that release of the cost reports would likely cause substantial harm to [their] competitive positions . . . ." *Humana of Virginia v. Blue Cross of Virginia*, 622 F.2d 76, 78-79 (4th Cir. 1980). Despite such contentions, courts have held that release is not prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. *See, e.g., Parkridge*

Hospital v. Califano, 625 F.2d 719 (6th Cir. 1980). While the documents at issue in the instant case are the underlying documents for the cost reports, rather than the cost reports themselves, the cited cases show that participation in government medical programs provides no expectation of avoiding public knowledge of health care providers' operations. This was emphasized by the Oklahoma Supreme Court, which found that cost reports and audits are not exempt from the Oklahoma Open Records Law:

> "Those who voluntarily choose to participate in a program which is primarily supported by tax dollars cannot reasonably expect the public which funds the program will be denied the right to scrutinize the basis on which the payments are made." *Tulsa Tribune Co. v. Oklahoma State Nursing Home Ass'n*, 55 Okla. B.J. 1358, 1359 (Okla. Sup. Ct. June 26, 1984).

The discovery documents supplied by the Hospitals, therefore, could not be hidden behind the shield of "confidentiality" on the amorphous basis of protecting business interests. Nor could the Hospitals validly have argued that individual privacy interests were at stake, since the Hospitals appear to already have excised all privileged material which might contain confidential information about individuals. *See supra* note 20.[21]

Even if it were alleged that the documents contain trade secrets, *e.g.*, the methodology by which the Hospitals set their service charges (a claim not raised by the Hospitals), this also would be, without more, an insufficient basis for granting a protective order under Rule 26(c). "The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the

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[21] Even if certain individual names remain in the discovery documents, that information could be redacted.

need for disclosure." Fed. R. Civ. P. 26 advisory committee note (1983); *see, e.g., Convey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

Thus, a generalized concern about confidentiality—whether concerning individual privacy or protection of alleged trade secrets—does not specify a harm sufficient to justify broad protective orders. The Hospitals were obligated to show with particularly that the discovery materials contained trade secrets or other confidential business information and "that disclosure . . . [would] work a clearly defined and very serious injury to [their] business[es]." *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). In not doing so, the Hospitals failed to show the "good cause" required for issuing a protective order.

Moreover, even had the parties supplied some basis for a protective order, a trial court must fully explicate its reasons for denying public access. *See Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970). Here, however, the district court's orders merely refer to "the confidential nature of the records," failing to explain why they were confidential or to support this assertion. Protective Order (Sept. 26, 1983), at 3; Protective Order (Sept. 9, 1983), at 5, *OHA v. DHS*. Indeed, the district court did not even review the documents. It simply accepted the conclusory claim of confidentiality which was made to it. This was insufficient since, as the Eighth Circuit has pointed out, courts ordinarily "should not take representations of interested counsel on faith" when a party moves for a protective order. *In re Iowa Freedom of Information Council*, 724 F.2d at 663.

Because of the lack of specificity of harm to the parties in the absence of protective orders, the instant case is not analogous to *Seattle Times Co. v. Rhinehart*, 104 S.

Ct. 2199, relied upon in part the Tenth Circuit.[22] The predicate of the *Rhinehart* decision was that the state trial court had established the existence of "good cause" for issuing a protective order under Rule 26(c). Thus, *Rhinehart* "does not dictate a result . . . unless [it is] determine[d] whether there was good cause for a protective order under Rule 26(c)." *Tavoulareas v. The Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984).

The *Rhinehart* trial court had first refused to issue an order protecting pre-trial discovery documents because "the facts alleged by [movant Rhinehart and his religious group] . . . were too conclusory to warrant a finding of 'good cause.'" *Seattle Times Co. v. Rhinehart*, 104 S. Ct. at 2204. It was not until the movants submitted "detailed" affidavits offering extensive support for the need for a protective order that the court entered a narrowly focused order. *Id.* The movants described letters and telephone calls threatening physical harm to those associated with the religious group, and "incidents at the group's headquarters involving attacks, and assaults" directed at the group and its members. *Id.* Only after such a persuasive showing did the *Rinehart* trial court find the "good cause" necessary for issuing a protective order.

In *Rhinehart*, this Court held that there was no special First Amendment interest in pre-trial discovery documents once a valid protective order was issued, a predicate not met in this case. However, this Court made clear that the impact on First Amendment rights is an essential element of a good cause finding, and is one factor to be balanced in determining if a valid protective order may be issued. Writing for a unanimous Court, Justice Powell stressed that "it is important to recognize

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[22] This case also differs from *Rhinehart* in its impact on the public interest. The underlying action in *Rhinehart* involved two private parties litigating a libel suit. Here, a state agency has agreed to pay $8 million in public funds to settle the underlying litigation. The public interest thus is significantly more affected in this case than in *Rhinehart*.

the extent of the impairment of First Amendment rights that a protective order may cause." *Id.* at 2207. In concurrence, Justice Brennan emphasized this by observing that "the Court today recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment." *Id.* at 2210 (Brennan, J., concurring).

The Tenth Circuit's decision, therefore, conflicts with *Rhinehart* by essentially reading out both the requirement of "good cause" and its integral requirement that First Amendment considerations be weighed, which were the foundations of the *Rhinehart* ruling. The decision below also is in conflict with the Ninth Circuit's reading of *Rhinehart.* In *In re Coordinated Pre-Trial Proceedings,* —— F.2d at ——, 10 Med. L. Rptr. at 2430, decided after *Rhineart,* the Ninth Circuit found that the "public and the press have the right to inspect public records and documents, including pretrial judicial records and documents," a right "grounded in both the common law and the first amendment," which must be balanced against conflicting governmental interests.

The district court in the instant case did not balance First Amendment concerns against interests in preventing abuse of the court's processes. *See Seattle Times Co. v. Rhinehart,* 104 S. Ct. at 2207-08. It did not consider the public nature of the questions raised in the Hospitals' litigation. It did not engage in "a careful weighing of competing factors." *Gulf Oil Co. v. Bernard,* 452 U.S. at 102. It did no balancing at all.

Courts do have discretion under Rule 26(c) to issue protective orders. *See Seattle Times Co. v. Rhinehart,* 104 S. Ct. at 2209. However, "the power to exercise 'discretion' does not imply that discretionary powers can be exercised without restraint." *In re Knoxville News-Sentinel,* 723 F.2d at 473. A district court's decision to enter a Rule 26(c) order is "not insulated from review merely because the judge has discretion in this domain." *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d at 1177. Here, the trial court abused its discretion by not

making any effort to weigh the factors and make a reasoned judgment. The Tenth Circuit understood *Rhinehart* as permitting such a result, a reading this Court did not intend and should not let stand.

In *Rhinehart*, this Court carefully balanced valid needs for protection during discovery with the long-established presumption that discovery normally is an open process. The decisions here drastically alter that balance, relying on *Rhinehart* instead to foreclose public access on the flimsiest of grounds. The effect of this case, if not reversed, will be that parties to litigation may keep materials hidden from public view essentially on demand, despite the fact that the matters hidden may involve, as here, expenditures of millions of dollars of public funds. This result could not possibly have been intended by the *Rhinehart* Court, and this Court should accept review of this case to correct the Tenth Circuit's dangerous misinterpretation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May 1, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-1171

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

v.

OKLAHOMA PUBLISHING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-83-1274-BT)

[Filed Nov. 27, 1984]

Michael Minnis of Pierson, Ball & Dowd, Oklahoma City, Oklahoma (Jack N. Goodman and Robert Trager of Pierson, Ball & Dowd, Washington, D.C., with him on the brief), for Appellant.

William C. Anderson (G. Michael Lewis and Leonard I. Pataki with him on the brief) of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma (Michael H. Cook, Douglas J. Colton, and Debbi M. Johnstone of Wood, Lucksinger & Epstein, Washington, D.C., with him

on the brief), for Appellee Oklahoma Hospital Association.

Before HOLLOWAY, Chief Judge, BARRETT, and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

Appellant, The Oklahoma Publishing Company (OPUBCO), appeals a district court's ruling refusing to vacate protective orders entered in a civil action styled *Oklahoma Hospital Association v. Oklahoma Department of Human Services*, bearing case number CIV-83-1274-BT. We will dismiss the appeal due to OPUBCO's lack of standing.

Background

In 1983 the Oklahoma Department of Human Services (DHS) changed the methodology by which it reimburses hospitals for inpatient hospital services provided to Medicaid beneficiaries under the Oklahoma Hospital Assistance Program. On May 10, 1984, the Oklahoma Hospital Association (OHA) brought an action against DHS challenging the new methodology and seeking an order requiring DHS to use a different reimbursement formula. OHA thereafter filed a motion for class certification; on July 5, 1983, the district court certified a plaintiff class comprised of some 120 hospitals. Noting that Eleventh Amendment concerns (prohibiting the awarding of retroactive monetary damages absent the State's waiver of its sovereign immunity) necessitated speedy resolution of the dispute, R. Vol. I at 252, the trial court set the final cutoff for discovery on September 21, 1983, with trial to commence on October 11, 1983. R. Vol. III at 702-03. In light of the expedited discovery completion date and trial

date, DHS filed motions to shorten the time for OHA to respond to its interrogatories and to its request for production of documents, and to shorten the time of "reasonable notice" under Rule 30(b)(1), Fed. R. Civ. P., for the taking of depositions. R. Vol. IV at 798. Following OHA's combined response to these motions but before the trial court had ruled on them, the parties agreed upon terms for reciprocal protective orders covering documents produced during discovery. *Id.* at 840.

According to the terms of the protective orders, the party seeking production of documents would first designate which classes of documents it wished to inspect. *Id.* The opposing party then would set aside the designated documents it claimed were privileged. *Id.* If the party seeking production disputed the claim of privilege and the parties could not resolve the dispute between themselves, the dispute was to be presented to the court for an *in camera* inspection of the claimed privileged documents. *Id.* at 841. Once documents were delivered to a party, access to those documents was limited to the parties' management-level employees, counsel, auditors, and expert witnesses, who were all required to keep the contents of the documents confidential. *Id.* at 842. This confidential status was to be maintained throughout the action, except with regard to documents introduced in open court. *Id.* All documents not introduced were, upon completion of the litigation, either to be returned to the party who produced them or destroyed. *Id.* at 842-43. The district court incorporated these stipulations into two protective orders—one covering documents produced by OHA, the other covering documents produced by DHS—which it issued pursuant to Rule 26(c), Fed. R. Civ. P. *Id.* at 839, 856. According to the district court, these protective orders were necessary because: (1) the discovery encompassed hundreds of thousands of documents, many of which were subject to various claims of privilege, and (2) the parties could not otherwise review requested doc-

uments, assert claimed privileges, and then produce remaining documents in time to meet the expedited trial date. (Order No. CIV-83-1274, Western District of Oklahoma, January 27, 1984, at 2.)

Following entry of the protective orders but before trial on the merits, the parties sought court approval of a Stipulated Settlement Agreement regarding the reimbursement methodology. A hearing on the proposed agreement was scheduled for December 15, 1983. On December 12, 1983, OPUBCO, who was not a party in the case, filed a motion to vacate the protective orders and sought an order "directing the parties to allow the public (including [OPUBCO]) access to all documents produced pursuant to discovery in this litigation." R. Vol. V at 1049. OPUBCO argued that the district court abused its discretion in granting the protective orders by not balancing "the interests to be protected against the historical and constitutionally-protected interest in open-court proceedings and the specific public interest in the items protected." R. Vol. V at 1054. OPUBCO's motion was opposed by OHA, but was neither opposed nor supported by DHS. On January 27, 1984, the district court denied OPUBCO's motion and ordered the return or destruction of the documents. On February 1, 1984, the court granted OPUBCO's motion to stay execution of that order for the purposes of this appeal.

II.

Discussion

During oral argument of this appeal, counsel for OPUBCO was asked upon what basis OPUBCO claimed standing to challenge the district court's imposition of protective orders in the underlying suit. Because standing is "a threshold requirement which empowers a federal court to adjudicate a dispute," *Hinkson v. Pfleiderer*, 729 F.2d 697, 700 (10th Cir. 1984), we cannot reach the merits of the case unless OPUBCO first demonstrates

that a "case or controversy" exists between it and OHA which is proper for judicial resolution. *Glover River Organization v. U.S. Dept. of Interior*, 675 F.2d 251, 253 (10th Cir. 1982).

OPUBCO's claim of standing is predicated on its alleged First Amendment right to gather information. R. Vol. V at 1054-55. OHA did not, in the district court, contest OPUBCO's standing insofar as OPUBCO sought to vindicate its own First Amendment rights. OHA did, however, contest OPUBCO's standing insofar as it attempted to assert the constitutional rights of the parties to the underlying suit. *Id.* at 1192. The district court in its order did not discuss OPUBCO's standing, except in noting that, as a nonparty, OPUBCO had no standing to assert the parties' First Amendment rights. (Order No. CIV-83-1274-BT, Western District of Oklahoma, January 27, 1984, at 5.)

The requirements for standing under Article III, Section 2, of the United States Constitution were recently clarified by the Supreme Court:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant" and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." (Citations omitted.)

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982), *quoted in Hinkson, supra*, 729 F.2d at 700. Beyond these "constitutional requirements," *Id.* at 474, the Court has also adhered to certain prudential principles, including the principle that a plaintiff cannot base his claim to relief on the legal rights of third parties, *Warth v. Seldin*, 422 U.S. 490, 499 (1975), and the principle

that a plaintiff's alleged injury must "arguably" fall within "the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question." *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 153 (1970). *Cf. Valley Forge, supra*, 454 U.S. at 474-475 (recognizing the continuing importance of prudential considerations).

OPUBCO, in its Motion to Appear Specially, alleged that were it not for the protective orders, the parties would be free to disseminate, and it would thereby be free to gather and publish, discovery documents not subject to those orders. This, we believe, is a sufficient allegation of injury in fact to satisfy the first requirement for standing under *Valley Forge*. Injury in fact, however, is not the sole constitutional requirement. We also must consider whether OPUBCO's alleged injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." The challenged action here is the district court's imposition of protective orders. In its Motion to Appear Specially, as noted earlier, OPUBCO moved to vacate the protective order and sought an order "directing the parties to allow the public (including [OPUBCO]) access to all documents produced pursuant to discovery in this litigation." R. Vol. V at 1049. OPUBCO's contention that it is merely seeking removal of "barriers to normal access," Reply Brief of Appellant at 16, is thus without merit. OPUBCO's alleged injury is that it was denied access to documents covered by the protective orders. We therefore must consider whether by vacating those protective orders OPUBCO will gain access to those documents.

While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order, *See Seattle Times Co. v. Rhinehart*, —— U.S. ——, 52 U.S.L.W. 4612 (No. 82-1721, May 21, 1984), it does not follow that they can be

compelled to disseminate such information. The Supreme Court recognized this proposition in *Wooley v. Maynard*, 430 U.S. 705, 714 (1976), when it noted "that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). This proposition applies with equal force notwithstanding that the parties to the underlying suit are an association and a state agency. *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 530, 533 (1979) ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."), *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

Consequently, assuming we were to lift the protective orders, still the parties to the unlerlying suit cannot be compelled, ipso facto, to disseminate documents in their possession; OPUBCO, a nonparty, can gain access to those documents only by exercising a party's right to disseminate. This it cannot do. *See Warth, supra; In Re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (1983) (Pratt, Circuit Judge, sitting by designation). Moreover, the protective orders were imposed by the district court following the parties' agreement and stipulation to terms and conditions for production of documents. R. Vol. IV at 840. Neither OHA nor DHS objected to or appealed from the district court's imposition of those orders. In light of the fact that the parties have not chosen to assert their rights of dissemination, we view it as highly unlikely that they would do so were we simply to lift the protective orders at this time. *Cf. Agent Orange, supra*, 96 F.R.D. at 584 ("Neither plaintiffs nor defendants have appealed from the special master's pro-

tective order, and the court concludes that CBS does not have standing to assert the parties' rights where they have not chosen to assert them at this time"). Consequently, it is unlikely that OPUBCO would succeed in obtaining the redress it seeks—access to the documents—were we to lift the protective orders. We therefore conclude that OPUBCO has failed to satisfy the second constitutional requirement for standing under *Valley Forge.*

Even if we were to assume, as OPUBCO contends, that this is not an "access" case, and that mere removal of the protective order is the only redress OPUBCO seeks (thus satisfying the second *Valley Forge* constitutional requirement), we would nonetheless deny OPUBCO's standing based on the prudential concern that the interest for which it seeks redress is not within the "zone of interest to be protected or regulated by the statute or constitutional guarantee in question." The interest OPUBCO seeks to protect is its alleged First Amendment right to gather information. Although it is true that the Supreme Court has recognized that newsgathering does warrant some First Amendment protection, *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972), that right is not unlimited: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 17 (1965). Thus, the Supreme Court has recognized that, whatever the extent of protection warranted newsgathering, it is no greater than the right of the general public to obtain information. *Pell v. Procunier,* 417 U.S. 817, 834 (1974) ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.") *Accord Branzburg v. Hayes, supra; Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978).

The Supreme Court recently stated that "pre-trial depositions and interrogatories are not public components of a civil trial." *Seattle Times, supra,* 52 U.S.L.W. at 4616. This is so, the Supreme Court recognized, because

"[m]uch of the information that surfaces during pre-trial discovery may be unrelated or only tangentially related, to the underlying cause of action." *Id.* Such is the case here. The district court entered protective orders in order to expedite a discovery process involving literally hundreds of thousands of documents, many of which were subject to claims of privilege. At that stage in the litigation, those documents had not been filed with the court and certainly had not satisfied threshold tests of relevancy and admissibility. They therefore were not available to the public generally, and OPUBCO does not have standing to complain about the existence of the protective order. *Cf. Agent Orange, supra,* 96 F.R.D. at 584 ("The same factors that support access to judicial records and other public documents . . . simply are not implicated where the materials were obtained by a party through discovery but have not been filed with the court"). Having determined that OPUBCO lacks standing to challenge the district court's imposition of protective orders, it is unnecessary for us to reach the substantive contentions.

DISMISSED.

JANUARY TERM—January 31, 1985

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

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No. 84-1171

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

vs.

OKLAHOMA PUBLISHING COMPANY,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellant Procedure, the suggestion for rehearing en banc is denied.

Judge Seymour did not participate.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, *et al.*,
Defendants.

[Filed Jan. 27, 1984]

ORDER

The Oklahoma Publishing Company's (OPUBCO) motion to vacate the protective orders previously entered is before the Court for decision after briefing and oral argument.

When expedited discovery of literally hundreds of thousands of documents was scheduled, the parties jointly applied to the Court for entry of protective orders. The requested protective orders were entered on September 12, 1983 relative to plaintiffs' documents and September 26, 1983 relative to defendants' documents. The movant seeks to have the protective orders vacated because of First Amendment rights in the subject matter of the action and the fact that no reasonable cause as provided in F.R. Civ.P. 26(c) was established for entry of the protective orders. Following OPUBCO's motion to vacate the subject protective orders, the principal parties, without prejudice to OPUBCO's motion, entered into a settlement of plaintiffs' claims.

OPUBCO acknowledged at the hearing on January 11, 1984, that all pleadings and evidence, both oral and documentary, offered in the record by the parties have been made available to it for its review. The parties agreed at the hearing that any discovery documents, the property of and furnished by the Department of Human Services (DHS) pursuant to the September 26, 1983 protective order, would be made available to OPUBCO for review. The documents at issue, numbering approximately one hundred thousand, are those produced by 4 of the 117 plaintiff hospitals under the protective order dated September 12, 1983. Copies of these documents at this time remain in the hands of DHS, and none have been filed in the case or offered by either party into the record.

ENTRY OF PROTECTIVE ORDERS

This case was originally set for trial on October 11, 1983. On September 2, 1983, DHS filed a request for production of documents, motion to shorten time to respond and motion for expedited discovery. Plaintiffs responded to the motions on September 8, 1983, and the Court held conferences on the motions September 8 and 9, 1983. According to counsel, hundreds of thousands of documents were encompassed by the discovery motions. Plaintiffs contended some of those documents were subject to various privileges and should not be made available to defendant. The parties agreed in light of the short time frame the plaintiffs could not review the requested documents, assert claimed privileges and produce the remaining documents before the trial date. Therefore, the parties agreed to a protective order restricting access to the documents. The expedited trial was dictated by the Eleventh Amendment considerations, preventing retroactive damages to the plaintiffs should they be entitled to relief. Under the protective order, the materials were to remain confidential, save and except any documents introduced in open court. All documents not introduced were to be returned to plaintiffs or destroyed upon completition of

the litigation (a copy of the subject protective order is attached as Exhibit "A"). A similar protective order was entered two weeks later covering documents produced by defendant DHS for plaintiffs.

Nonjury trial of the case was set for October 11, 1983. At that time, the parties announced a tentative settlement had been reached. On November 22, 1983, the parties reached a final settlement agreement, and on December 15, 1983, the Court approved the settlement following notice to the plaintiff class. OPUBCO's motion to vacate the protective orders was filed December 12, 1983.

RIGHT OF ACCESS/RIGHT TO DISSEMINATE DISCOVERY MATERIALS

OPUBCO contends it has a right of access to the discovery materials at issue under the First Amendment of the United States Constitution. It seeks an order granting OPUBCO such access.

Clearly, a party to a lawsuit who gains information through discovery may exercise its First Amendment right to disseminate that information absent a protective order. *See Leonia Amusement Corp. v. Loew's*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955); *In re Halkin*, 598 F.2d 176 (D.C.Cir. 1979). Thus, as in *In re Halkin, supra*, where a protective order is entered over the objection of a party, the Court must take into consideration the First Amendment right of that party in determining whether "good cause" exists to enter the order. *Id.* at 193.

Furthermore, OPUBCO has a constitutionally protected right of access to filed documents, court exhibits or trial proceedings, all of which are a matter of public record. *In re Application of National Broadcasting Co.*, 635 F.2d 945, 949-51 (2nd Cir. 1980). Access to discovery materials which are not a part of the public record, however, is another matter and this is the issue here presented. Discovery under the Federal Rules of Civil

Procedure is liberal, giving parties broad powers to gather information. In *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981), the court stated:

> ". . . a deponent may be obliged to reveal information that will not be admissible at trial. Unlike evidence at trial, it has not passed the strict threshold tests of relevance and admissibility, yet it has been compelled by dint of legal process. The information revealed may be irrelevant, prejudicial, or pose an undue invasion of an individual's privacy."

Id. at 115.

In *In re Agent Orange Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y. 1983), the court dealt with a request by a nonparty for access to discovery materials. In denying the request, the court stated:

> "The same factors that support a right of access to judicial records and other public documents—the public's right to know and the public interest in insuring that judicial proceedings are conducted fairly, to name but two—simply are not implicated where the materials were obtained by a party through discovery but have not yet been filed with the courts."

Id. at 584.

The Court acknowledges some of the materials sought may be a matter of public interest as the lawsuit involves the expenditure of large sums of public funds. However, none of the materials sought by OPUBCO are part of the public record. Moreover, the parties to this action agreed and stipulated to the protective order and have not chosen to assert their First Amendment right to disseminate information they have obtained.[1] OPUBCO, as a nonparty, has no standing to assert the First Amendment rights of the parties. *Barrows v. Jackson*, 346 U.S. 249, 255

[1] The plaintiffs oppose the motion to vacate the protective orders and defendant DHS has taken no position on the motion.

(1953); *In re Agent Orange Product Liability Litigation, supra,* at 584. This ruling in no way prevents OPUBCO from reporting on the litigation at issue, or obtaining the same material from other, independent sources. *Id.* It is pertinent to note the right to speak and publish does not carry with it the unrestrained right to gather information. *See Zemel v. Ruck,* 381 U.S. 1, 17 (1965); *Pell v. Procunier,* 417 U.S. 817, 833-34 (1974).

Just as the parties have a right to disseminate discovery information absent a protective order, they have a right not to disseminate such information, for "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). Thus, this Court cannot compel the parties to release information contained in the discovery materials to OPUBCO.

The request of OPUBCO to be granted access to subject discovery documents is denied, but the protective orders are to be vacated as hereafter provided. Any party, including OPUBCO, shall have until February 3, 1984, to file a motion to stay the effect of this order pending appeal. If, by that date, no motion to stay has been filed, the parties are to return *all* copies of any documents covered by the protective orders of September 12, 1983, and September 26, 1983, by February 10, 1984. The expense of exchanging the documents are to be born by the owner of the originals. The protective orders shall thereafter expire on February 13, 1984.

ENTERED this 25th day of January, 1984.

/s/ Thomas R. Brett
THOMAS R. BRETT
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, *et al.*,
Defendants.

[Filed Sept. 9, 1983]

PROTECTIVE ORDER

Defendants filed their First Request for Production of Documents, Motion to Shorten Time to Respond, and Motion for Expedited Discovery herein on Friday, September 2, 1983. Copies were served by regular mail on counsel for Plaintiffs, and received by them on September 6, 1983. Counsel for Plaintiffs had no prior notice of the filing of these Motions. Plaintiffs served their Response to said Motion, together with Motion for Protective Order, by hand delivery to counsel for Defendants on September 8, 1983. The Court has held conferences with counsel for the parties on September 8 and 9, 1983, concerning said Motions.

With respect to Category V of the Defendants' First Request for Production of Documents, Plaintiffs do not object to production. Plaintiffs are therefore directed to produce said documents on September 14, 1983, at the Federal Court House, in Oklahoma City, at the hearing now scheduled there for 8:00 A.M.

With respect to categories I through IV of the Defendants' First Request, Plaintiffs have made and preserved objections based on relevance and burdensomeness. However, in order to expedite discovery, so that trial may go forward as now scheduled, Plaintiffs are prepared to agree to production of documents covered by categories I through IV of the Defendants' First Request pursuant to the stipulated terms as hereinafter set forth and ordered.

At the direction of the Court, the parties have conferenced in an effort to agree upon the terms for a Protective Order and a schedule for production. They have agreed and stipulated upon the following terms and conditions for production of documents pursuant to the Defendants' First Request, which the Court hereby approves and adopts as the Order of the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Production shall take place at the business offices of the respective hospitals, and shall exclude privileged documents.

2. No original documents shall be removed from the hospitals, except that with respect to odd-size copies for which on-site copying capability is unavailable, original documents may be removed for copying elsewhere, but must remain in the custody of a hospital employee or of counsel for Plaintiffs for the purpose of such off-site copying.

3. On arrival at the hospitals, Defendants shall designate which classes of documents set forth in categories I through IV of their First Request they wish to inspect.

4. Plaintiffs shall review said classes of documents concerning claims of privilege, and set aside any documents they claim to be privileged.

5. Defendants shall inspect the classes of documents they have designated, except for the documents set aside pursuant to a claim of privilege.

6. After inspection, Defendants shall designate which documents they desire copies of.

7. If requested, Plaintiffs shall acquaint Defendants with the general nature of any documents claimed to be privileged. If Defendants disagree as to the asserted privilege, and if the parties cannot resolve such disagreement between themselves, the disagreement shall be immediately presentd to the Court for resolution (including *in camera* inspection by the Court of the questioned documents, if appropriate).

8. Copies of the documents designated by Defendants pursuant to paragraph 6 above shall be made by or under the supervision of the hospitals or their counsel, with copies to be made and delivered to Defendants as soon as practicable after designation.

9. Defendants shall pay the actual cost incurred by each respective hospital in making copies of the designated documents, upon receipt of invoices which will be processed by DHS in the ordinary course; the parties agree that this charge is 10¢ per copy. Any commercial copying charges will be billed directly by the copying service to the party receiving the copies.

10. Production shall occur one hospital at a time, on a rotating basis, in the following sequence unless altered by agreement of the parties, commencing 8:30 A.M., September 12, 1983:

St. John Medical Center, Inc.

Hillcrest Medical Center

St. Anthony Hospital

Comanche County Memorial Hospital

St. Francis Hospital, Inc.

Oklahoma Hospital Founders, Inc.
d/b/a Oklahoma Osteopathic Hospital.

The parties will attempt to complete document discovery in one day or less at each hospital, although additional time may in some cases be required.

11. In view of the confidential nature of the records in question, any document copies delivered to Defendants, and all of the contents thereof, as well as all of the contents of any document reviewed but not copied, shall be maintained in strict confidence by the Defendants, with access thereto limited to management-level employees of Defendants, counsel for Defendants, Defendants' auditors, and Defendants' expert witnesses. All such persons having access to said copies shall be likewise bound by this Court-ordered obligation of confidentiality. Such confidential status shall be maintained continuously through the completion of this action, save and except only with respect to any such documents that are introduced in open court. All such documents not introduced, and all copies thereof, shall be returned to Plaintiffs or destroyed upon completion of the litigation. Defendants are required to identify no later than the pre-trial conference on September 27 all such documents they intend to offer at trial.

12. In producing any given document pursuant to the Defendants' First Request, Plaintiffs shall not be deemed to have waived any right to object to admission of the same in evidence on grounds of privilege, relevance or any other applicable ground; nor to have waived any right to object to further production from other members of the class.

13. Defendants have agreed to serve St. Francis Hospital, Inc. with a subpoena duces tecum covering Items I through IV of Defendants' First Request,

with service to be made upon William C. Anderson, one of the counsel for Plaintiffs. Thereupon, production by St. Francis Hospital, Inc. shall be deemed subject to the provisions of this Protective Order.

With respect to the Defendants' Motion to Expedite Discovery, the Court will take the same under advisement for the time being. However, as announced to counsel at the conference on September 8, the Court is unequivocally of the view that Defendants, and Plaintiffs for that matter, are entitled to expedited discovery as necessary in order to complete discovery within the time prescribed by the Court's Order of August 24. The Court would prefer that the parties schedule this discovery between themselves, without the intervention of the Court being required. The parties have agreed to work cooperatively in this direction, and to present to the Court only those scheduling issues which cannot be resolved by agreement. The Court has observed that the conduct of multiple discovery tasks on the same day or days may be necessary, as well as Saturday discovery work, in order to complete discovery within the allotted time. Counsel for Plaintiffs have assured the Court that they will staff discovery at as many locations as Defendants designate, so that the production of documents and taking of depositions may proceed simultaneously. The Court will remain on call to assist the parties in expediting the completion of discovery, and to make such Orders as may be necessary concerning the time and place of discovery, to make rulings on questions of privilege, and to resolve promptly any other issues which may arise.

IT IS SO ORDERED this 9th day of September, 1983.

/s/ Thomas R. Brett
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-1171

THE OKLAHOMA PUBLISHING COMPANY,
Appellant,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Appellees.

AFFIDAVIT OF RICHARD FREEMAN

COMES NOW the undersigned, Richard Freeman, and after being duly sworn does state under oath that:

1. I am an assistant general counsel to the Department of Human Services for the State of Oklahoma and have entered an appearance on behalf of the Oklahoma Department of Human Services in the above-styled matter.

2. This affidavit is being made solely in response to a request from the appellant for use in a petition for rehearing.

3. On behalf of the Oklahoma Department of Human Services, I have under my possession and control the documents that are the subject of the above-styled appeal, i.e. the documents produced by the appellees (Hospitals) in response to defendant's "First Request for Production of Documents" (Sept. 2, 1983) in the proceedings below.

4. The appellant has previously asked for access to these documents. Access has been denied because of the "Protective Order" (Sept. 9, 1983) entered in the case below.

5. If this "Protective Order" is vacated, the appellant will be provided with access to the documents sought.

FURTHER AFFIANT SAITH NOT.

/s/ Richard Freeman
RICHARD FREEMAN

COUNTY OF OKLAHOMA)
) ss:
STATE OF OKLAHOMA)

Subscribed and sworn to before me this 5th day of December, 1984.

/s/ Marilyn K. Gordon
Notary Public

My Commission Expires:
August 1, 1986

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1708

In The
Supreme Court of the United States
October Term, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Rule 26(c), Fed. R. Civ. P. 11

No. 84-1708

In The

Supreme Court of the United States

October Term, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I. INTRODUCTION

In its Petition for Certiorari, the Oklahoma Publishing Company (hereinafter "OPUBCO") continues its attempts, rejected in the courts below, to bring itself within the scope of decisions of this Court and lower courts concerning the right of access of the press to judicial proceedings and other presumptively public sources of information. But the documents to which OPUBCO seeks access were produced during pre-trial discovery pursuant to protective orders stipulated and agreed to by the parties. The documents were never introduced in evidence or made a part of the public record. The issues raised by OPUBCO have been decided adversely to OPUBCO's posi-

tion by this Court's decision last term in *Seattle Times Co. v. Rhinehart*, — U.S. —, 52 U.S.L.W. 4216, 81 L.Ed.2d 17 (1984). The inescapable conclusion is that OPUBCO seeks access to materials to which it has no entitlement or right, either under the First Amendment to the Constitution, or under common law, and certiorari should therefore be denied.

This action was commenced by the Respondents, Oklahoma Hospital Association and five of its member hospitals (hereinafter referred to in the aggregate as "OHA"), seeking injunctive and declaratory relief concerning the methodology by which the Oklahoma Department of Human Services (hereinafter "DHS") calculated reimbursement to hospitals for inpatient hospital services provided pursuant to Oklahoma's medical assistance program. This case was certified as a class action by the District Court, the OHA being named representative of a class consisting of approximately 117 hospitals (Respondents' Appendix to Brief in Opposition to Petition for Writ of Certiorari at A-2 (hereinafter "Resp. App. at —"). OPUBCO was not a party to the action.

A three day trial was held on OHA's request for a preliminary injunction. This relief was denied, but in so ruling, the District Court, after finding there was a likelihood OHA would prevail on the merits, directed that trial on the merits should proceed on an expedited schedule, at a date only some six weeks later. (Appendix to Petition for Writ of Certiorari at 2a, 12a) (hereinafter "App. at —"); (Resp. App. at A-17 to A-20). Soon thereafter, DHS served OHA with a massive document request, and OHA served a similar but narrower request on DHS.

With the consent, and upon the stipulation of OHA and DHS, the District Court entered protective orders governing the conditions under which these hundreds of thousands of documents were to be produced during this expedited phase of trial preparation. The orders provided that all copies made of documents and records produced by OHA or DHS were to be maintained in strict confidence, and access to such copies limited to certain specified individuals (such as management level officers of the parties, counsel and expert witnesses), having need therefor in the course of trial preparation. The orders further required that the confidential status of the document copies be maintained throughout the completion of the action, with the exception that any documents introduced in evidence were to lose their confidential status; further, all copies of documents not introduced in evidence were to be destroyed or returned to the party producing the same, upon the completion of the litigation.

The protective orders clearly reflect a good faith effort by the parties to construct a comprehensive procedure for handling extensive document production encompassing hundreds of thousands of documents, in a short time period. This time limitation was mandated by the expedited trial schedule, which was in turn dictated by Eleventh Amendment considerations which prohibited the OHA from recovering retroactive money damages from the DHS (Resp. App. at A-17, A-18; App. at 2a, 12a).

The procedure agreed to by the parties permitted complete production to occur without the loss or waiver of such objections as relevance, scope of discovery, or privilege, and without the loss of confidentiality. The alternative would have been to require the parties and the Dis-

trict Court to make a painstaking and time-consuming review of massive numbers of documents during the expedited pre-trial phase, so as to be able to make necessary rulings on objections to production. This would have consumed much of the Court's time. It would also have consumed much of the time available to the parties and their counsel during this brief pre-trial period, time which was critically needed for other aspects of trial preparation.

On the eve of trial, the parties reached a settlement which the District Court, after following established class action procedures concerning notice and hearing, accepted and approved. The Stipulated Settlement Agreement, and all exhibits attached thereto, were filed that same day, and were open to public inspection. No portion of the settlement proceeding before the District Court was closed to the public, and no records filed with the District Court were sealed.

Three days prior to the hearing to consider the proposed settlement, OPUBCO filed its Motion to Vacate the protective orders. The DHS took no position on OPUBCO's Motion, although it did state in the hearing on that Motion before the District Court that it stood by its agreements with the OHA concerning production of the documents as set forth in the stipulated protective orders, unless and until those orders were modified, and that the DHS did not request that any such modifications be made.

The OHA strenuously opposed OPUBCO's requests on the grounds that OPUBCO had no right of access to discovery material not part of the public record or introduced in a public proceeding; that OPUBCO had no stand-

ing to assert the First Amendment rights of the parties to disseminate the discovery materials when the parties themselves chose not to do so; and that OPBUCO's request that it be granted compulsory access to the documents was impossible to grant without violation of the parties' own First Amendment rights. The District Court's order (App. at 11a) determined that the document copies in question were not part of the public record; that OPUBCO had no standing to assert the First Amendment rights of the parties; and that the court could not compel the parties to grant OPUBCO access to the discovery documents. The opinion of the Court of Appeals (App. at 1a) determined that OPUBCO's contention it was merely seeking the removal of barriers to normal access to sources of information was without merit; that OPUBCO lacked standing to assert or exercise the First Amendment rights of the parties; and that it was unlikely OPUBCO could obtain the redress sought even if the protective orders were vacated, for the simple reason that the court would be powerless to compel the parties to grant OPUBCO access to the documents.

OPUBCO's statement of the reasons for granting the Writ in the instant case and its statement of the questions of law presented which warrant review by this Court, simply ignore the facts of this case. These facts clearly support the Order of the District Court and the decision of the Court of Appeals.[1]

---

[1] OPUBCO also ignores the fact that all documents and records of the DHS are available to OPUBCO for inspection, and, as recognized by the District Court (App. at 12a), all documents furnished by the DHS pursuant to discovery are available to OPUBCO for review. It is only the documents provided by the OHA and its member hospitals that are involved herein.

OPUBCO seeks access to discovery documents privately exchanged between the parties to litigation which, most importantly, were never introduced in any portion of the proceeding in the District Court, never became part of the public record, and never became part of any source of information to which public access exists. As is clear from the Order of the District Court and the opinion of the Court of Appeals, OPUBCO originally sought an order of the District Court compelling the parties to the litigation to provide OPUBCO with access to these private documents. It was only after the absurdity of this position became apparent that OPUBCO attempted to cast this matter as one involving First Amendment rights of access.

OPUBCO similarly attempts to imply that the protective orders were wholly unjustified and simply entered by the District Court upon the request of the parties. This utterly ignores the nature of the case, the volume of the material involved, the time within which the production was to be accomplished, and other factors which were well known to the District Court and to the parties (App. at 16a-20a). Rather than being a departure and a deviation from the principles established by this Court, the decisions of the District Court and the Court of Appeals are clearly in harmony with prior decisions of this Court, as well as other Courts of Appeal, and should not be disturbed.

II. THE CIRCUIT COURT'S HOLDING THAT OPUBCO LACKS STANDING TO CHALLENGE THE PROTECTIVE ORDERS IS CORRECT.

In arguing that the Court of Appeals' decision is in conflict with decisions of this Court and other Courts of

Appeal, OPUBCO cites decisions which apply principles of law with which the OHA completely agrees, but which have no application to the facts of this case. The case of *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), involved the press' standing to seek access to evidence submitted during a criminal trial. The case of *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), involved the transcript of voir dire proceedings in a criminal trial. Similarly, the cases of *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); and *Gannett Co. v. De Pasquale,* 443 U.S. 368 (1969), each involved the press' standing to challenge the closure of a public proceeding.

In the instant case, OPUBCO sought access to private documents, which, although exchanged between parties to litigation, had never become part of the public record.[2] Clearly, decisions with respect to the press' right of access must take cognizance of the factual circumstances surrounding the case. As has been long recog-

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[2] At pp. 6 and 7 of its Petition, OPUBCO cites out of context portions of the deposition of a DHS auditor, pertaining to the propriety of certain hospital expenditures reflected by a few of the documents in question. The short answer is that notwithstanding a searching review of all the documents by a small army of DHS accountants and auditors, the DHS never made or attempted a showing that reimbursement had been sought for any of these expenditures under the Medicaid program. Indeed, it was after this searching review of the documents that DHS decided to settle. OPUBCO's reference to these materials is therefore nothing more than a transparent effort to inflame the Court by reference to documents which the Court of Appeals stated had not "passed the threshold tests of relevancy and admissibility," (App. at 8a-9a).

nized by this Court, the right to gather news is not unlimited. The extent of that right is no greater than the right of the general public to obtain information. *Nixon v. Warner Communications, Inc., supra; Pell v. Procunier,* 417 U.S. 817 (1974); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Branzburg v. Hayes,* 408 U.S. 665 (1972).

OPUBCO persists in citing and relying upon cases involving media access to public records, trials, or hearings to support its attempts to gain access to the documents in question. This Court, in *Seattle Times,* has recently examined the very issues presented by OPUBCO. The *Seattle Times* decision teaches that there are very different considerations with respect to public records and judicial proceedings on the one hand, and pre-trial discovery, on the other. This is a distinction which OPUBCO would have the Court now ignore. Rather than overlooking the body of precedent concerning the access of the press to judicial proceedings and public records, it is clear that the Court of Appeals correctly recognized that body of authority as being inapplicable under the facts of this case, despite OPUBCO's efforts to misconstrue this matter as coming within the purview of those authorities.

The protective orders entered by the District Court in this matter in no way restrain OPUBCO from publishing or disseminating any information which may come into its possession, or from having access to any information which is part of the public record. OPUBCO is in no way restrained by the District Court's action, nor is it foreclosed from access to any source of information to which it is entitled to have access. The protective orders leave OPUBCO's First Amendment rights untouched.

OPUBCO, under the guise of asserting its First Amendment rights, would have this Court destroy all distinctions between public and private sources of information, unreasonably impede the discovery process, and unnecessarily burden the district courts in the entry of protective orders. None of the parties to this action objected to the terms of or the entry of the protective orders; to the contrary, the orders were entered upon the voluntary stipulations of the parties. None of the parties objected to the protective orders based upon the parties' own First Amendment rights. No hearing or proceeding before the District Court was ever closed. No pleadings on file in this case are held under seal. The three-day trial on preliminary injunctions was open to the public, as was the hearing to consider the proposed settlement, and all of the exhibits and testimony received at those hearings are of public record. OPUBCO has not been denied access to any public records, nor has it been excluded from any hearing.[3] In short, OPUBCO seeks to have this Court ignore the basic proposition long

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[3] At pages 4 and 5 of its Petition, OPUBCO makes much of the Motion to Disqualify filed against the District Judge by DHS. This Motion was not filed until after the District Judge had ruled, in connection with the preliminary injunction issue, that there was a likelihood OHA would prevail on the merits, and set the case on an expedited trial schedule (Resp. App. at A-17 to A-20). This motion was obviously filed for tactical reasons, as a reaction to the ruling on the preliminary injunction issue. In any event, the Motion to Disqualify was fully briefed, and given a full evidentiary hearing and oral argument. DHS did not seek appellate review of the District Judge's denial of the Motion to Disqualify. Most importantly, the hearing on the motion was not closed, nor was any pleading or exhibit filed in connection therewith sealed. Every aspect of the resolution of this motion was open to the public.

recognized by this Court, that the right of freedom of speech does not carry with it the right of unrestrained access to information, *Pell v. Procunier, supra; Zemel v. Rusk, supra.*

In those cases where a protective order has been attacked on the basis of the First Amendment, including the *Seattle Times* case, the right of a party to disseminate information obtained through civil discovery has been involved. In the instant case there has been no such involvement. If the parties hereto have agreed and stipulated to the protective order and have chosen not to assert their First Amendment right to disseminate information that they have obtained in discovery, OPUBCO has no standing to assert that right upon their behalf, as recognized by both the District Court and the Court of Appeals. It is a fundamental concept, long recognized by the courts, that one may not claim standing to vindicate the constitutional rights of a third party. *See Barrows v. Jackson,* 346 U.S. 249 (1953); *In re Agent Orange Product Liability Litigation,* 96 F.R.D. 582 (E.D.N.Y. 1983).[4]

Lastly, vacating the protective orders would not grant OPUBCO the relief it seeks. As noted by the District Court and Court of Appeals in this case, the parties can-

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[4] In the *Seattle Times* case, this Court denied the right of a newspaper-party, the Seattle Times, to disseminate documents obtained by it (subject to protective order) in pretrial discovery; OPUBCO, as a non-party, surely cannot be afforded greater rights than those enjoyed by a party, as recognized in the *Agent Orange* cases cited herein.

not be compelled to provide the documents in question to OPUBCO, and OPUBCO cannot assert the parties' First Amendment rights with respect to these documents in order to obtain access to them. Moreover, as recognized by the lower courts in this case, the relief originally sought by OPUBCO, that of compulsory access to the documents, cannot be granted without violating the parties' First Amendment rights. It is abundantly clear that the ultimate relief sought by OPUBCO, access to the OHA's private documents, simply cannot be granted by a court, as was clearly recognized by both the District Court and the Court of Appeals.

III. THE DECISIONS BELOW, IN REFUSING TO VACATE THE PROTECTIVE ORDERS, ARE PROPER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE AND ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

OPUBCO ignores the obvious facts and circumstances of this case, as well as the clear import of recent decisions of this court and lower courts. In arguing the applicability of the provisions of Rule 26(c), Fed. R. Civ. P., OPUBCO blurs the distinction between the rights of a party to disseminate information obtained in the discovery process and the rights of access of a non-party to documents not part of the public record. OPUBCO further ignores the circumstances surrounding this case, as well as the realities of litigation and discovery practice.

As this Court recognized in *Seattle Times,* it is essential that trial courts have substantial latitude to fashion appropriate protective orders as part of the broad and liberal nature of the discovery process. OPUBCO has persisted since its first appearance in the District Court in ignoring the difference between discovery material and the public record. This difference has been recognized by numerous lower courts that have considered the matter and have ruled that there is no right of access to such documents, *see e.g., In re Agent Orange Products Liability Litigation,* 98 F.R.D. 539 (E.D.N.Y. 1983).

To follow OPUBCO's argument to its conclusion, a district court, in every instance where a protective order concerning documents was sought, would be required to conduct a full scale hearing and to make findings on a document by document basis. Especially in cases such as the present one, where the orders were agreed to in good faith and proposed by the parties themselves as practical devices to permit inspection (and, if requested, copying) of hundreds of thousands of private hospital documents within the few weeks remaining prior to an expedited trial date, such a process would be an obvious waste of judicial resources. Good cause clearly existed. And absent the agreement of the parties and the stipulated protective orders in this case, the District Court would have been required to review the massive numbers of documents in question to determine objections on relevancy and privilege grounds, all within the time constraints imposed by the expedited trial schedule. This Court, in *Seattle Times,* recognized the practical aspects of discovery and was critical of the imposition of require-

ments that would have resulted in unduly burdening and complicating the discovery process, 81 L.Ed.2d at 29, n.23. As the Court of Appeals stated:

> "The Supreme Court recently stated that 'pre-trial depositions and interrogatories are not public components of a civil trial.' *Seattle Times, supra,* 52 U.S.L.W. at 4616. This is so, the Supreme Court recognized, because '[m]uch of the information that surfaces during pre-trial discovery may be unrelated or only tangentially related, to the underlying cause of action.' *Id.* Such is the case here. The district court entered protective orders in order to expedite a discovery process involving literally hundreds of thousands of documents, many of which were subject to claims of privilege. At that stage in the litigation, those documents had not been filed with the court and certainly had not satisfied threshold tests of relevancy and admissibility. They therefore were not available to the public generally, and OPUBCO does not have standing to complain about the existence of the protective order. *Cf. Agent Orange, supra,* 96 F.R.D. at 584 ('The same factors that support access to judicial records and other public documents . . . simply are not implicated where the materials were obtained by a party through discovery but have not been filed with the court'). . . ." (App. at 8a-9a).

OPUBCO's argument that the protective orders in question should be vacated because the District Court failed to consider First Amendment issues is ludicrous. OPUBCO raised the issue at the hearing to vacate (App. 11a). The District Court reviewed the grounds for the granting of the protective orders and rejected OPUBCO's arguments (App. 12a-13a). For OPUBCO to now state

that the District Court failed to consider those issues is disingenuous at best.

IV. CONCLUSION

OPUBCO has persistently ignored or misconstrued the facts of this case and injected irrelevant matters in its attempts to obtain relief to which it is not entitled. The District Court and the Court of Appeals correctly determined, based upon the facts and circumstances of this case, that OPUBCO simply has no right to the relief requested. OPUBCO attempts to cast those decisions as being in conflict with prior decisions of this Court and other Courts of Appeal. OPUBCO is simply wrong.

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
PRELIMINARY INJUNCTION

(Filed August 26, 1983)

On July 13, 14 and 15, 1983, a hearing was had and evidence received concerning the plaintiffs' application for a preliminary injunction. On May 10, 1983 the plaintiffs commenced this action against the Oklahoma Department of Human Services ("DHS") and its director, Henry A. Bellmon. The plaintiffs allege the defendants' amendment to the State of Oklahoma Medicaid State Plan of Hospital Reimbursement violates several federal and state constitutional, statutory and regulatory provisions and the terms of the Medicaid provider agreements between the plaintiff hospitals and DHS in that hospitals will be reimbursed under the amendment at rates less than the rates required by law. Plaintiffs further allege that the amendment was enacted without proper notice and comment procedures and without a meaningful op-

portunity for participation in the process by the Oklahoma Medical Care Advisory Committee. Plaintiffs seek declaratory and injunctive relief, including a preliminary injunction preventing the defendants from continuing to implement the amended reimbursement methodology and from revising the reimbursement methodology in any manner that does not meet the pertinent substantive and procedural requirements. Defendants in response assert that the amended plan is proper in all respects and that the plaintiffs are not entitled to the requested preliminary injunction.

After considering the evidence presented, arguments of counsel, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action arising under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, (commonly known as the Medicaid Act), the implementing federal regulations, the United States Constitution, the Oklahoma Statutes and was also brought by plaintiffs under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

2. The original named plaintiffs in this case were the Oklahoma Hospital Association and five specified Oklahoma hospitals. On July 5, 1983 the Court entered an order on motion of the plaintiffs certifying this case as a class action consisting of approximately 117 Oklahoma hospitals.

3. The defendants in this action are the Oklahoma Department of Human Services ("DHS"), and its direc-

tor, Henry A. Bellmon. By order the new DHS diector Robert Fulton has been substituted as a party defendant for Henry A. Bellmon and the action proceeds against Fulton in his representative capacity.

4. Defendant DHS is the state agency charged with responsibility for the administration of the Oklahoma Medicaid Program.

5. The Department of Health and Human Services ("HHS") is the federal agency charged with responsibility for the administration of the federal aspects of the Medicaid program.[1]

6. State Medicaid programs, including Oklahoma's, are required to reimburse hospitals for inpatient hospital services in accordance with the federal Medicaid law and the regulations implementing that law.

7. Pursuant to the Medicaid Act, 42 U.S.C. § 1396 (a)(13)(A), states are required to pay hospitals for inpatient hospital services furnished to Medicaid beneficiaries at rates that are:

> reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and

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[1] The Court has concluded HHS is not an indispensable party to this action. *See Arthur C. Logan Memorial Hospital v. Toia*, 441 F.Supp. 26, 27 (S.D.N.Y. 1977); *Montana Deaconess Hospital v. Department of Social and Rehabilitation Services*, 538 P.2d 1021, 1024 (Mont. 1975). *See also* Court's Exhibit 1, Letter to the Court from Robert P. Jaye, Deputy Assistant General Counsel, Department of Health and Human Services.

to assure that individuals eligible for medical assistance have reasonable access to . . . inpatient hospital services of adequate quality; . . . .

7. HHS has published regulations implementing 42 U.S.C. § 1396(a)(B)(A). 42 C.F.R. Part 435. Those regulations provide in pertinent part:

447.252 General requirements.

(a) *Payment rates.* (1) The Medicaid agency must pay for inpatient hospital services and long-term care facility services through the use of rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.

(2) The payment rates used by the Medicaid agency must be determined in accordance with methods and standards developed by the agency.

(3) With respect to inpatient hospital services—

(i) The methods and standards used to determine payment rates must take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs; . . .

* * *

(iii) The payment rates for such services must be adequate to assure that recipients have reasonable access, taking into account geographic location and reasonable travel time, to inpatient hospital services of adequate quality.

* * *

(b) *State findings.* The Medicaid agency must find that the rates used to reimburse providers satisfy the requirements of paragraphs (a)(1) and (1)(3) of this section.

(c) *State assurances.* The Medicaid agency must make assurances satisfactory to the Secretary that the requirements of paragraphs (a)(1) and (a)(3)(iii), (b), and (f) of this section are met and that, in making significant changes in its methods and standards for determining payment rates, it has complied with the public notice requirement in § 447.254.

(d) *Submittal of assurances and related information.* The Medicaid agency must comply with the requirements regarding submittal of assurances and related information in § 447.255. . . ."

* * *

8. Prior to April 1, 1983, Oklahoma reimbursed hospitals for inpatient services furnished to Medicaid beneficiaries the hospitals' actual reasonable costs of providing such services based upon the federal Medicare program's reasonable cost formula.

9. Background of the federal Medicaid program:

While participation in the federal Medicaid program is voluntary, once a state chooses to participate it must comply with federal statutory requirements. *Harris v. McRae,* 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed. 2d 784, 794 (1980).

Originally, states were required to reimburse hospitals for inpatient services provided to Medicaid patients on the basis of cost methodology used by the federal Medicare program. In response to concerns about spiraling costs, Congress amended Title XIX in 1972 to allow, and even encourage, each state to develop its own alternative reimbursement scheme. As explained in *Alabama Nursing Home Association v. Harris,* 617 F.2d 388, 392 (5th Cir. 1980):

> Congress intended that state authorities in developing methodologies for reasonable cost related reimbursement have great flexibility in the areas of cost-finding and rate-setting. The legislative history indicates that states are to be free to experiment with methods and standards for payment that would be simpler and less expensive than the complex Medicare reasonable cost formula. See S.Rep. No. 92-1230, 92d Cong., 2d Sess. 287 (1972). . . . Additionally, Congress intended that states have freedom both to define allowable cost items and to set a value on the reasonable cost of such items.

The legislative history of the 1980 Boren amendment, which replaced the "reasonable cost-related" reimbursement rate standard for nursing and intermediate care facilities with the current "efficiently and economically operated facilities" standard, indicates congressional "intent that a State not develop rates under this section solely on the basis of budgetary appropriations." H.R. Conf.Rep. 1479, 96th Cong., 2d Sess. 154, reprinted in 1980 U.S.Code Cong. & Ad. News 5526, 5903, 5944.

It is clear that in moving Medicaid away from Medicare reimbursement standards and encouraging alternative reimbursement plans in 1972, in eliminating the reasonable cost standard as applied to nursing homes in 1980 and hospitals in 1981, and in cutting Medicaid funding in 1981, Congress intended to encourage Medicaid cost containment. The legislative history of the Omnibus Budget Reconciliation Act of 1981, which set the current standards for hospital reimbursement rates found in 42 U.S.C. § 1396a(a)(13)(A), states:

> In eliminating the current requirement that States pay hospitals on a Medicare "reasonable cost" basis for inpatient services under Medicaid, the Committee

> recognizes the inflationary nature of the current cost reimbursement system and intends to give States greater latitude in developing and implementing alternative reimbursement methodologies that promote the efficient and economical delivery of such services."

H.R.Rep. No. 158, 97th Cong. 1st Sess. 293 (1981).

Prior to April 1, 1983, the Oklahoma legislative appropriation to DHS was reduced by $40,000,000.00. As a result DHS was making substantial across the board cuts in all of its services and programs. The principal motivation for the instant prospective Medicaid reimbursement methodology was the budget shortfall. During the first half of 1983 the decline in Oklahoma sales tax receipts persisted, thus prolonging DHS' budgetary problems.

10. By letter dated January 28, 1983, DHS advised the Medicaid providers in Oklahoma that the State of Oklahoma would be changing its Medicaid reimbursement plan to a prospective system effective April 1, 1983 due to rapidly declining state sales tax receipts and a significant rise in reimbursement payments. (D-14). A "proposed hospital payment method" was included with the letter and noted that DHS was aware alternative proposals might be developed by the Oklahoma Hospital Association as well as by other interested parties.

11. On February 24, 1983 DHS advised the Medicaid providers by letter that their current provider agreements with DHS were being terminated effective April 1, 1983 and that due to changes in federal law and the development of a new reimbursement methodology new provider agreements would have to be entered into between DHS and each provider wishing to continue in the Medicaid program. (D-18). During the month of March 1983 the

Medicaid providers throughout the State of Oklahoma in a spirit of cooperation executed the new provider agreements and returned them to DHS, although Oklahoma's new prospective Medicaid reimbursement plan was still in the drafting stage.

12. By March 21, 1983 the proposed Oklahoma Medicaid plan had been modified substantially from the original January 28 proposal. On that day DHS officials presented to the Oklahoma Medical Care Advisory Commission ("MCAC") in oral form for the first time a proposed revision to its state Medicaid plan with respect to the methodology used for reimbursing hospitals for inpatient services. The MCAC was not given an opportunity to review the plan or to extensively comment upon it because the MCAC was advised by DHS that the plan revision would be submitted to the Oklahoma Welfare Commission the following day, March 22, 1983 for its approval, independent of what action the MCAC took with respect to the plan revision. The MCAC approved the proposed plan with one vote in opposition and one abstention with the understanding dialogue would continue in reference to further revisions. The next day, the proposed Oklahoma plan was presented to the Oklahoma Commission for Human Services by DHS personnel, and was approved by unanimous vote.

13. Thereafter, DHS published notice of the proposed change in the Oklahoma reimbursement methodology in the Sunday, March 27, 1983 editions of the Daily Oklahoman and the Tulsa World (D-25).

14. DHS continued its analysis and discussions with HHS which resulted in further modifications of the pro-

posed Oklahoma plan, including the breakout of levels of care. By letter dated April 15, 1983 the defendant Bellmon submitted Oklahoma's proposed Medicaid plan to the Dallas regional office of HHS for its required approval. The Dallas regional office immediately forwarded the request to HHS's main office in Baltimore. The April 15 letter made the assurances required in 42 C.F.R. § 447.252 with the exception of the assurances that the State had made the findings of fact required by 42 C.F.R. § 447.252(b) regarding the reasonableness and adequacy of its rates, and that such rates are adequate to assure that recipients have reasonable access to inpatient hospital services of adequate quality (D-33, 34). By letters of April 25 and April 26, 1983, defendant Bellmon provided the excluded assurances and additional clarifications requested by HHS as well as an appeal procedure[2] (D-35 through 43). On April 27, 1983 HHS approved DHS's state plan amendment. DHS submitted no factual data, empirical analysis, studies, or other information to HHS in support of its proposed state Medicaid plan.

15. During the months of March and April representatives of various providers objected to substantive aspects of the proposed plan, to the fact they were not being given an adequate opportunity to review and consult, and further that the hospitals were required to approve the plan before it had been finalized.

16. On April 28, 1983, retroactive for services furnished on or after April 1, 1983, DHS modified its state Medicaid plan with respect to the methodology to be used

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[2] The appeal process will not permit a substantive review beyond the scope of the specific provisions of the plan.

in calculating payments to hospitals for inpatient hospital services furnished to Medicaid patients. This methodology provides that DHS will reimburse hospitals for such services on a per diem basis *at the lesser of:*

1. the hospital's actual costs for its most recent cost reporting period ending prior to June 30, 1982, adjusted by the rate at which the component of the consumer price index for all medical rose through June 30 of that calendar year;
2. the hospital's actual costs for its most recent cost reporting period ending prior to June 30, 1980, adjusted by the rate at which the consumer price index for all medical care rose through June 30 of that calendar year;
3. or the actual cost of the 60th percentile facility's cost after every hospital's actual costs for the most recent cost reporting period ending prior to June 30, 1980, has been adjusted as described under (2), above.

These costs are to be determined separately for five different types of care within the hospital—routine, nursery, intensive, coronary and burn. An exception is provided in the plan for hospitals that demonstrate that reimbursable Medicaid patient days constitute at least 25% of the hospital's total days of inpatient services; excepted hospitals are reimbursed under methodology (1) above. A small number of the plaintiff hospitals qualify for the exception. The principal exception hospitals are state owned and operated.

17. DHS conducted no factual or empirical analysis or other evaluation concerning the relationship between its proposed payment rates and the costs that must be incurred by efficiently and economically operated hospi-

tals in providing services to Medicaid beneficiaries. DHS simply concluded reimbursement at the 60th percentile level for the cost reporting period ending prior to June 30, 1980, plus the inflation factor, should adequately compensate the efficiently and economically operated hospital for the balance of 1983.

18. DHS estimates that its new payment methodology would reimburse hospitals $13,000,000 less than the hospitals received from DHS during DHS' fiscal year that ended on June 30, 1982 (D-60).

19. DHS gave inadequate consideration in developing the new methodology to certain factors that significantly impact on hospital costs such as "fixed capital costs, the costs of graduate medical education programs, and costs related to distinctions in hospital patient-mix and the level of technology and sophistication of services offered at different hospitals. While there is nothing in the Medicaid Act that specifically requires that these factors be addressed in a state's reimbursement scheme, it is the reasoned judgment of persons experienced in developing and administering hospital care prospective payments systems that it is not possible to have a rational program that meets the federal standard without taking into consideration these well recognized factors that impact on hospital costs (Schramm Depo., pp. 118-120, 160-161).

20. Even if a hospital theoretically receives its costs, but its rates are based upon the hospital's 1980 cost data, the rates do not reflect reimbursement for any capital expenditures incurred since 1980.

21. The House Report to the 1981 Medicaid Amendments explicitly provided:

> "The Committee intends states to recognize that facilities that provide teaching services or other specialized tertiary care services may have operating costs which exceed those of a community hospital. The Committee is concerned that the reimbursement methods established by the states recognize the need to provide a full range of both primary care and tertiary care services to Medicaid beneficiaries and take into account the differences in operating costs of the various types of facilities needed to provide this broad scope of services. . . ."

H. Rep. No. 97-158, Vol. II, 97th Cong., 1 Sess., at 294 (June 19, 1981).

Large referral hospitals provide more specialized personnel and equipment within the various levels of care, notably routine and intensive care, than do smaller facilities. A rational plan cannot ignore the distinctions between the costs of a 600 bed urban medical center and a 60 bed rural community hospital.

22. HHS did not look behind the assurances that DHS made, but rather, reviewed DHS' methodology to insure that DHS, in fact, made the required assurances. HHS made no determination the DHS assurances were founded upon supporting factual information.

23. Some economists would question DHS' selection of the "all medical care" component of the consumer price index ("AMCI") to use in inflating a hospital's 1980 and 1982 costs forward to the new rate period. The AMCI includes price increases for many types of medical care, including physician, dentist, and pharmacy services, that are unrelated to inpatient hospital care. The

AMCI is a price index and not a cost index; in other words it measures the degree to which prices of purchasing health care rose in a given time period and not the degree to which the costs of providing that care rose (Schramm Depo., p. 143; Lyman Depo., p. 59). Other more accurate inflation indexes are available. The most significant problem with using the AMCI is that it is inappropriate to develop a rate under a prospective system using prior cost data when the inflation factor utilized to roll the past costs forward to the start of the new payment system does not reflect actual hospital cost inflation prior to the date upon which the prospective rates are implemented (Schramm Depo., pp. 146-149).

24. DHS cites the case of *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511 (5th Cir. 1983) in which Mississippi's prospective Medicaid plan was recently approved by the Fifth Circuit Court of Appeals in March 1983. The Court notes that there is a marked contrast between the Oklahoma plan and the Mississippi plan. The Mississippi plan passes through capital costs, groups hospitals by bed size, accounts for the costs of medical education, establishes a cap on noncapital expenditures for each peer group, accounts for varying labor costs in urban and rural locations, adjusts base period costs for hospital industry inflation, and establishes a substantive appeal process which permits costs reimbursement for legitimate exceptions to the plan.

25. If a hospital receives inadequate Medicaid cost reimbursement it has the following options: (1) refuse to treat Medicaid patients or reduce its Medicaid patient

load[3], (2) provide a lower level of care to Medicaid patients than that received by other patients, (3) cut its costs down in whatever manner may be possible, (4) make up the difference out of accumulated surplus or endowment funds, or (5) charge other patients or their insurers the additional cost of treating Medicaid beneficiaries.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and the doctrine of pendent jurisdiction. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

2. Insofar as a Finding of Fact above might be properly characterized a Conclusion of Law it is incorporated herein.

3. The preliminary injunction requested by the plaintiffs is an extraordinary equitable remedy granted only where the right to relief is clear. *Goldammer v. Fay,* 326 F.2d 268, 270 (10th Cir. 1964); 11 Wright and Miller, *Federal Practice and Procedure:* Civil § 2942, at 368 (1973). To obtain a preliminary injunction the plaintiffs must establish the following: (1) a substantial likelihood of recovery on the merits; (2) a showing that the plaintiffs will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the plaintiffs outweighs whatever damages the proposed injunction

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[3] This is an impractical option due to the policies of most hospitals and religious tenets of some hospitals to admit all patients as well as the medical profession's commitment to not refuse treatment to any sick person.

may cause the defendants; and (4) a showing that the issuance of the injunction would not be adverse to public interest. *Otero Savings and Loan Ass'n v. Federal Reserve Bank,* 665 F.2d 275, 278 (10th Cir. 1981); *National Indian Youth Council v. Andrus,* 623 F.2d 694, 695 (10th Cir. 1980) (per curiam); *Lundgrin v. Claytor,* 619 F.2d 61, 63 (10th Cir. 1980); *Continental Oil Company v. Frontier Refining Company,* 338 F.2d 780, 781 (10th Cir. 1964).

4. Standard of review: As the action of a governmental agency is in question, the Court concludes it should be tested by the "arbitrary and capricious" standard. Thus, the inquiry provoked is whether the administrative decisions were based on relevant factors or whether there was a clear error in judgment. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). The Court is not empowered to substitute its judgment for that of the agency so the standard of review is a narrow one. The Court's function is exhausted where a rational basis is found for the agency action taken. *Sabin v. Butz,* 515 F.2d 1061, 1067 (10th Cir. 1975); *see Coleman v. Darden,* 595 F.2d 533, 539 (10th Cir. 1979); *Hurley v. United States,* 575 F.2d 792, 793-94 (10th Cir. 1978); and *Squaw Transit Company v. United States,* 402 F.Supp. 1278, 1286-87 (N.D. Okl. 1975) (three-judge panel).

The Fifth Circuit noted in *Mississippi Hospital Ass'n, Inc. v. Heck'er,* 701 F.2d 511, 516 (5th Cir. 1983), a case also involving a state's prospective Medicaid reimbursement plan, that a "presumption of validity" attaches to the "agency action."

It is also a well-settled rule of statutory construction that interpretation given a statute by the agency charged with its administration is entitled to deference from the courts. *Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981); *see Franks v. Nimmo,* 683 F.2d 1290, 1295 (10th Cir. 1982), and *Kenneth v. Schmoll,* 482 F.2d 90, 95 (10th Cir. 1973). However, the courts are the final authorities on issues of statutory construction and "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission v. Democratic Senatorial Campaign Committee, supra,* 454 U.S. at 31-32.

5. By the evidence presented the plaintiffs have demonstrated a substantial likelihood of success on the merits. The absence of any reasonable analysis, factual support or rational foundation for the rates developed by DHS indicates a substantial likelihood that plaintiffs will succeed in demonstrating DHS' assurances that the rates are reasonable and adequate to meet the costs of efficiently and economically operated hospitals and that the rates assure reasonable access to inpatient hospital services, were not based upon proper findings of fact as required by 42 C.F.R. § 447.252(B), and that, as such, DHS' adoption of the payment rates was arbitrary and capricious and in violation of the federal laws. *California Hospital Association v. Schweiker,* 559 F.Supp. 110, 117 (C.D.Calif. 1982); *Thomas v. Johnston,* 557 F.Supp. 878, 910-11 (W.D. Tex. 1983).

Essentially the plan methodology concludes that the most a hospital will be reimbursed is the 60th percentile

for the year 1980 reimbursement plus an inflation factor. The plan thus concludes each hospital in the upper 40% of the 1980 reimbursement plus inflation will be reimbursed in 1983 "the costs it must incur as an efficient and economically run hospital." Such a conclusion, if the result of a rational analysis of factors relative to an efficiently and economically run hospital, will pass the test of arbitrariness. However, if the conclusion is not centered in a rational relationship to the Medicaid costs that must be incurred by the efficiently and economically run hospital, but in fact is arrived at to fit within available departmental budgeted funds, it will not pass the congressionally mandated test. In summary, the plaintiffs' evidence thus far has established the defendant arbitrarily determined a hospital in 1983, if operated efficiently and economically, will be reimbursed its Medicaid patient costs that must be incurred by receiving the 60th percentile for the 1980 reimbursement period plus the inflation factor.

6. Plaintiffs have also demonstrated a substantial likelihood that they will succeed on the merits with respect to plaintiffs' claim that defendants did not afford Oklahoma's MCAC the opportunity to participate in a meaningful manner in development of the new Medicaid reimbursement methodology, as required by 42 C.F.R. § 431.12.

7. Plaintiffs have no adequate remedy at law because, under the Eleventh Amendment to the United States Constitution, Oklahoma is immune from suit in federal court for retroactive money damages. *Florida Department of Health and Rehabilitative Services v. Florida*

Nursing Home Association, 450 U.S. 147, 150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981). Therefore, if the plaintiffs ultimately recover on the merits they will be irreparably injured by the continuing monthly reimbursement shortfall as any damage award may not be retroactive to April 1, 1983.

8. As for the evidence concerning threatened injury to the plaintiffs outweighing whatever injury the proposed injunction may cause the defendants, the Court concludes the scales tip in favor of the defendants. The evidence demonstrates that DHS has recently undertaken extensive cost containment measures in all of its programs and not just in the area of Medicaid. The state appropriation for DHS for fiscal year 1984 provided approximately $40,000,000.00 less than the anticipated DHS budgetary requirements for the fiscal year. The budgetary problems of DHS have exacerbated by continuing monthly reductions in sales tax revenues. The issuance of an injunction would compel DHS to make additional reductions or perhaps eliminate programs and services which are already financially troubled in order to comply with the court mandated increases in Medicaid reimbursement. It is a matter of weighing the present temporary hospital reimbursement shortfall against the DHS budget chaos that would result from instant reversion to the Medicare cost reimbursement pre-April 1, 1983. However, should the plaintiffs prevail on the merits, they should not be expected to tolerate the continuing reimbursement shortfall injury long. (For this reason trial on the merits will be set at an early date.)

9. In weighing the public interest or public policy factors, the considerations appear about equal. On the

one hand it is in the public interest for all DHS' sound established programs and services to continue at reasonable budgeted levels and also to encourage reasonable medical cost containment. On the other hand, the public has a strong interest in insuring public agencies obey the law and insuring continued availability of needed medical services to indigents.

10. For the reasons expressed above, particularly criteria number 3 concerning injury to the defendants being greater than the temporary injury experienced by the plaintiffs should the preliminary injunction be issued, the plaintiffs' application for temporary injunction is denied.

11. All evidence received at the hearing on plaintiffs' request for a preliminary injunction is now a part of the record on the trial of this action and need not be repeated at trial. Rule 65(a)(2), F.R.Civ.P. The scheduling for trial on the merits is as follows:

(a) Exchange of the names and addresses of all witnesses including experts in writing on or before September 9, 1983;

(b) Final discovery cut-off is set for Wednesday, September 21, 1983;

(c) Final pretrial conference is set for Tuesday, September 27, 1983 at 8:30 A.M., *in Tulsa, Oklahoma;*

(d) Final pretrial order is to be filed by Friday, September 30, 1983;

(e) Suggested Findings of Fact and Conclusions of Law are to be filed on or before Tuesday, October 4, 1983;

(f) The case is set for trial to the Court on Tuesday, October 11, 1983 at 9:30 A.M.

IT IS SO ORDERED this 24th day of August, 1983.

/s/ THOMAS R. BRETT
United States District Judge

Office - Supreme Court, U.S.
FILED
JUN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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June 10, 1985

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REPLY BRIEF FOR PETITIONER

Respondents Oklahoma Hospital Association, *et al.*, (OHA) contend that this case involves no more than the district court putting its imprimatur on a private agreement between OHA and the Oklahoma Department of Human Services (DHS) to exchange documents before settling a lawsuit. OHA contends that the public and the press do not have standing to question whether the district court acted in compliance with the Federal Rules of Civil Procedure or whether the contents of the documents in fact justified secreting them from public view.

If the decision below stands, the public will have lost—lost its right to examine documents which were the basis of millions of public dollars being paid to the Respondents, lost its right to assess the propriety of decisions made by public officials, and lost its right to determine whether the

judicial system has functioned properly. Preventing the press, and therefore the public, from challenging protective orders will lead only to more "private" agreements, ratified by courts, closing the judicial process to public view. This is not what the Federal Rules of Civil Procedure intended, nor does it comport with numerous decisions of this Court and other courts of appeals.

I. OPUBCO HAS STANDING TO CHALLENGE THE PROTECTIVE ORDERS

OHA's argument that Petitioner The Oklahoma Publishing Company (OPUBCO) lacks standing to challenge the protective orders ignores the irrefutable fact that this is the only reported case in which the press has been refused the opportunity to challenge a court's closure or protective order. As OPUBCO showed in its Petition for Certiorari, at 11-13, courts consistently have allowed the press to argue against such orders. The decision in the very case on which OHA relies, *In re Agent Orange Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y. 1983) (Brief in Opp. at 10, 12), was on the merits of the press' claim that documents should be open to the public. The court there did not question the press' standing to make such an argument.

OHA argues that OPUBCO erred in citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); and *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), since "each involved the press' standing to challenge the closure of a public proceeding." Brief in Opp. at 7. In fact, in each case the proceedings were as "private" as the one at bar until, in two instances, this Court ordered them opened. In none of these cases was the press' standing to object to the trial court's order even challenged.

To argue that the press and public cannot contest a closure order because it pertains to a "private" instead of a "public" document or proceeding is to presuppose the answer to the very question in dispute. *See, e.g.*, Brief in

Opp. at 9. If orders sealing documents cannot be challenged because the documents withheld from view become, by definition, "private," this Court's rulings in *Globe Newspapers*, *Richmond Newspapers*, and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), would be meaningless.

OPUBCO argues that the orders must be vacated because they were not issued in accord with Fed. R. Civ. P. 26(c). While the protective orders are in place, OPUBCO and the public are barred from knowing the contents of documents which OHA contends support the payment to its members of millions of dollars in public funds. Counsel for DHS has affirmed that access to the documents will be afforded OPUBCO if the protective orders are vacated. *See* Pet. for Cert. at 15 n.16. Since DHS has indicated that the documents would be released, OPUBCO is entitled to seek removal of the protective orders. DHS's repeated argument that OPUBCO's claim is either overbroad or ineffectual is therefore misplaced.[1]

Keeping secret the documents in dispute make purposeless OHA's assertion that OPUBCO is free to publish whatever it learns through other means. The explanation for DHS's decision to settle a lawsuit and to pay millions of public dollars to OHA's members is locked in unavailable documents. So long as OPUBCO cannot even challenge the decision making these documents inaccessible to the public, the public will remain uninformed.

Similarly, it is disingenuous for OHA to imply that because certain portions of the underlying litigation were open to the public, it is unnecessary for OPUBCO to view

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[1] As OPUBCO pointed out (Pet. for Cert. at 16-18), under Fed. R. Civ. P. 5(d), added in 1980, the district court has the authority to order that materials produced in discovery be filed in court, for the express purpose of making them available to non-parties. Contrary to OHA, the decision whether or not the public may have access to discovery materials is not one belonging exclusively to the parties.

the documents in question. *See* Brief in Opp. at 9-10. OHA again relies on its self-created distinction between "public" and "private" records to claim that OPUBCO lacks standing because it is an unwelcome interloper into a two-party agreement. Court after court has recognized that the press, as surrogate for the public, is entitled to object to closed judicial records and proceedings. Even if OHA and DHS had agreed on the protective orders, they could not agree to prevent the press from challenging that agreement.

Respondents suggest that the touchstone for whether documents produced in discovery are "public" is whether or not they were filed with the court. However, as the advisory committee notes to Fed. R. Civ. P. 5(d) indicate, the decision to dispense with the filing of discovery materials in the normal course was made to conserve courthouse storage space, and not with any intention of effecting a substantive change in the presumptively public character of discovery material. Fed. R. Civ. P. 5(d) advisory committee note (1980); *see* Note, *Access to Pretrial Documents under the First Amendment*, 84 Col. L. Rev. 1813, 1827 (1984). Thus, materials produced in discovery, absent the entry of a valid protective order, are as much "public" as any other part of the judicial process, regardless of whether they were lodged with the court.

II. GOOD CAUSE WAS NOT SHOWN TO SUPPORT THE PROTECTIVE ORDERS

The power of the district court to require production of documents in discovery was activated by Respondents when they filed suit to increase the amount of public funds they would receive. OHA concedes, as it must, that if its case had gone to trial, the documents would have been revealed. It cannot contend that the decision of DHS to settle before trial changed the character and status of the material OHA produced in order to pro-

ceed with its claim. As OPUBCO pointed out above, whether or not the documents were actually filed in court does not affect their status, and the courts have recognized that the presumption of access to judicial records is fully applicable to pretrial proceedings in civil cases. *See In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984).

OHA claims that OPUBCO has argued for "unrestrained access" to the documents and has attempted to assert the First Amendment rights of the parties in challenging the protective orders. Brief in Opp. at 5. To the contrary, OPUBCO's position is only that the protective orders were issued without any showing of good cause, and that the protective orders thus were improperly maintained in effect.

Given opportunity after opportunity to offer a good cause for an order restricting disclosure, OHA has suggested no more than that the documents are "confidential," *see* Pet. for Cert. at 18, and that an expedited trial schedule was dictated by Eleventh Amendment considerations. Brief in Opp. at 3. A mere assertion of confidentiality is insufficient under Rule 26(c) to justify a protective order. Pet. for Cert. at 18-22. The argument that a desire for an expedited trial obviated the inquiry required by Rule 26(c) is equally unavailing. The district court established a system to review any documents as to which claims of privilege were made during the expedited discovery period. *See id.* at 19 n.20, 18a.[2]

Moreover, protective orders are not immutable. *See American Telephone & Telegraph Co. v. Grady*, 594 F.2d

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[2] OHA in fact did employ this procedure as to a number of documents DHS sought. Moreover, as was indicated at the hearing on OPUBCO's motion, OHA employed six people to review the documents before production. Hearing Transcript at 15. It is unlikely that any further review would have been warranted in the absence of the protective orders.

594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). As the district court noted in *In re Coordinated Pretrial Proceedings*, 101 F.R.D. 34, 44 (C.D. Cal. 1984), "[u]mbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) . . . ." By the time OPUBCO moved to vacate the protective orders, document production had been completed and a settlement reached. Thus, the reasons asserted by OHA for the protective orders were no longer relevant when the district court acted on OPUBCO's motion. By acting when it did, OPUBCO did not precipitously interrupt orderly procedures or impede discovery. In that situation, the burden of establishing a specific basis for continued protection of discovery documents must fall on the party seeking protection. *Id.* OHA never attempted to meet that burden.

While this Court did state in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208 (1984), that "pretrial depositions and interrogatories are not public components of a civil trial," this was in the context of a protective order issued with clearly established good cause. That circumstance does not pertain in the instant case.

OHA is incorrect in asserting that *Rhinehart* is dispositive of this case. Brief in Opp. at 1-2. First, *Rhinehart* involved a properly issued protective order. The trial court there initially determined that good cause had not been shown and refused to grant an order. Only when detailed affidavits were submitted explaining the likely harms that would result in the absence of a protective order did the trial court find good cause and enter an order. The dispute in *Rhinehart* was whether, in the context of that order issued after a careful weighing of the Rule 26(c) standards, the First Amendment nonetheless required that disclosure be allowed.

By contrast, in the instant case no evidence of good cause justifying a protective order was ever presented.

See Pet. for Cert. at 18-19. OHA's constant references to "public" records and "private" records, then, assumes the answer to an inquiry not made in this case.[3]

Second, the underlying case in *Rhinehart* was litigation between two private parties over an entirely private dispute. The underlying case here instead involves an action against a public agency which resulted in the payment of millions of dollars of public funds to members of OHA.

OHA argues that it and DHS agreed upon entering the protective orders and that OPUBCO has no right to assert First Amendment rights on behalf of the parties to the underlying action. *Id.* at 3, 5. First, Rule 26(c) requires good cause to be shown before a protective order can be entered, even if the parties have agreed to such an order. Second, OPUBCO's Petition for Certiorari showed that DHS did not willingly agree to enter into and continue in force any such agreement. Third, OPUBCO is not asserting rights of the parties, but instead that the First Amendment rights of the public and press must be considered when a Rule 26(c) protective order is being considered. Despite OHA's contention to the contrary, the record in no way reflects that the district court gave more than cursory consideration to the protective orders, and considered the interests of the public not at all.

Finally, it is difficult to understand OHA's assertion that it is "ludicrous" for this Court to entertain OPUBCO's suggestion that the district court erred in not considering the First Amendment. Brief in Opp. at 13. This Court stated in *Rhinehart* that a protective order

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[3] OHA's contention that the discovery documents here are entirely private is curious. OHA asked the Oklahoma Department of Human Services for millions of dollars in *public* funds. The documents in question are the records which support that claim to public money.

may cause an "impairment of First Amendment rights." 104 S. Ct. at 2207. In Justice Brennan's concurrence he said that this Court "recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment." *Id.* at 2210. The decisions below, therefore, are a substantial departure from this Court's balancing of competing interests in *Rhinehart*.

CONCLUSION

The decisions below have the effect of foreclosing any public inquiry into matters in litigation and, what is worse, preventing the press—which this Court has recognized functions as the public's surrogate—from ever challenging the secreting of documents used to support a claim of millions of dollars in public funds. For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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